88-21221

Supreme Court, U.S.
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JUN 23 1989
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No.

In the Supreme Court of the United States

October Term, 1989

KATHLEEN MARIE EHRSAM,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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MENT OF QUESTION PRESENTED FOR REVIEW

Whether Pennsylvania's mandatory minimum sen-
g act violates the due process clause of the
enth Amendment to the United States Constitution
it prohibits the sentencing judge from considering
nt facts about the offense and the individual circum-
s and characteristics of the defendant in imposing an
priate sentence and places in the hands of the prose-
unbridled discretion in determining which defen-
vill be subject to the mandatory penalties contained
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The Pennsylvania Mandatory Minimum Sentencing Act violates the due process clause of the Fourteenth Amendment to the United States Constitution in that it prohibits the sentencing judge from considering relevant facts about the offense and the individual circumstances and characteristics of the defendant in imposing an appropriate sentence and places in the hands of the prosecutor unbridled discretion in determining which defendant will be subject to the mandatory penalties contained therein	19
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FOR A WRIT OF CERTIORARI TO THE
ME COURT OF PENNSYLVANIA

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ner, KATHLEEN MARIE EHRSAM, re-
that a writ of certiorari be issued to review
ne Supreme Court of Pennsylvania entered
ing on April 27, 1989.

HE OPINIONS DELIVERED
OURTS BELOW

ge Leonard B. Sokolove of the
of Bucks County regarding the
ylvania's Mandatory Minimum
hereto and made Appendix "A".

on for Reconsideration of Sen-
nd made Appendix "B".

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eration of sentence is attached

uperior Court of Pennsylvania is
h v. Ehrsam, 355 Pa. Superior
986) and is attached and made

reme Court of Pennsylvania dat-
ving Petitioner's first Petition for
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r permission to file a second Pe-
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of Pennsylvania did not issue an
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Court of Pennsylvania advising
Petition for Allowance of Appeal
s made Appendix "G".

III.

(1) The
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(2) The
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EMENT OF JURISDICTION

of the Supreme Court of Pennsylvania
l 27, 1989, and this Petition for Certi-
in sixty (60) days of that date.

iction of this Honorable Court is in-
S.C. §1257(a).

IV. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States in pertinent part provides:

> ... nor shall any state deprive any person of life, liberty, or property, without due process of law.

The Pennsylvania Act of 1974, December 30, P.L. 1052, No. 345, §1, effective in 90 days. As amended 1980, October 5, P.L. 693, No. 142, §401(a), effective in 60 days; 1982, March 8, P.L. 169, No. 54, §2, effective in 90 days, 42 Pa. C.S.A. §9712 provides:

> **Sentences for offenses committed with firearms**
>
> (a) **Mandatory sentence.**—Any person who is convicted in any court of this Commonwealth of murder of the third degree, voluntary manslaughter, rape, involuntary deviate sexual intercourse, robbery as defined in 18 Pa. C. S. §3701(a)(1)(i), (ii) or (iii) (relating to robbery), aggravated assault as defined in 18 Pa. C. S. §2702(a)(1) (relating to aggravated assault) or kidnapping, or who is convicted of attempt to commit any of these crimes, shall, if the person visibly possessed a firearm during the commission of the offense, be sentenced to a minimum sentence of at least five years of total confinement notwithstanding any other provision of this title or other statute to the contrary.

(b) **Proof at sentencing.**—Provisions of this section shall not be an element of the crime and notice thereof to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after conviction and before sentencing. The applicability of this section shall be determined at sentencing. The court shall consider any evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable.

(c) **Authority of court in sentencing.**—There shall be no authority in any court to impose on an offender to which this section is applicable any lesser sentence than provided for in subsection (a) or to place such offender on probation or to suspend sentence. Nothing in this section shall prevent the sentencing court from imposing a sentence greater than that provided in this section. Sentencing guidelines promulgated by the Pennsylvania Commission on Sentencing shall not supersede the mandatory sentences provided in this section.

(d) **Appeal by Commonwealth.**—If a sentencing court refuses to apply this section where applicable, the Commonwealth shall have the right to appellate review of the action of the sentencing court. The appellate court shall vacate the sentence and remand the case to the sentencing court for imposition of a sentence in accordance with this section if it finds that the sentence was imposed in violation of this section.

(e) **Definition of firearm.**—As used in this section "firearm" means any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive or the expansion of gas therein.

The Pennsylvania Act of 1972, December 6, P.L. 1482, No. 334, §1, effective June 6, 1973. As amended 1980, October 1, P.L. 689, No. 139, §1, effective in 60 days; 1980, October 16, P.L. 978, No. 167, §2, effective in 60 days, 18 P.S. §2702 provides:

Aggravated assault

(a) **Offense defined.**—A person is guilty of aggravated assault if he:

(1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life;

(2) attempts to cause or intentionally, knowingly or recklessly causes serious bodily injury to a police officer making or attempting to make a lawful arrest or to an operator of a vehicle used in public transportation while operating such a vehicle;

(3) attempts to cause or intentionally or knowingly causes bodily injury to a police officer making or attempting to make a lawful arrest;

(4) attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon; or

(5) attempts to cause or intentionally or knowingly causes bodily injury to a teaching staff member,

school board member, other employee or student of any elementary or secondary publicly-funded educational institution, any elementary or secondary private school licensed by the Department of Education or any elementary or secondary parochial school while acting in the scope of his or her employment or because of his or her employment relationship to the school.

(b) **Grading.**—Aggravated assault under subsection (a)(1) and (2) is a felony of the second degree. Aggravated assault under subsection (a)(3), (4) and (5) is a misdemeanor of the first degree. Whenever any person has been previously convicted or adjudicated a delinquent in this Commonwealth for the offense set forth in subsection(a)(5), a subsequent petition, indictment or information of aggravated assault under subsection (a)(5) shall be classified as a felony of the third degree.

The Pennsylvania Act of 1972, December 6, P.L. 1482, No. 334, §1, effective June 6, 1973, 18 P.S. §2701 provides:

Simple Assault

(a) **Offense defined.**—A person is guilty of assault if he:

(1) attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another;

(2) negligently causes bodily injury to another with a deadly weapon; or

(3) attempts by physical menace to put another in fear of imminent serious bodily injury.

(b) **Grading.**—Simple assault is a misdemeanor of the second degree unless committed in a fight or scuffle entered into by mutual consent, in which case it is a misdemeanor of the third degree.

The Pennsylvania Act of 1972, December 6, P.L. 1482, No. 334, §1, effective June 6, 1973, 18 P.S. §2705 provides:

Recklessly endangering another person

A person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.

The Pennsylvania Act of 1972, December 6, P.L. 1482, No. 334, §1, effective June 6, 1973, 18 P.S. §906 provides:

Possessing instruments of crime

(a) **Criminal instruments generally.**—A person commits a misdemeanor of the first degree if he possesses any instrument of crime with intent to employ it criminally.

(b) **Possession of Weapon.**—A person commits a misdemeanor of the first degree if he possesses a firearm or other weapon concealed upon his person with intent to employ it criminally.

(c) **Definitions.**—As used in this section the following words and phrases shall have the meanings given to them in this subsection:

"Instrument of crime."

(1) Anything specifically made or specially adapted for criminal use; or

(2) Anything commonly used for criminal purposes and possessed by the actor under circumstances not manifestly appropriate for lawful uses it may have.

"**Weapon.**" Anything readily capable of lethal use and possessed under circumstances not manifestly appropriate for lawful uses which it may have. The term includes a firearm which is not loaded or lacks a clip or other component to render it immediately operable, and components which can readily be assembled into a weapon.

V. STATEMENT OF THE CASE

(a) Factual History

In July, 1983, Petitioner, a 29-year-old housewife, lived in a house with her husband and two sons in Bucks County, Pennsylvania, which was leased from Andrew Woehrel. Her husband's sole income, owing to a back injury, came from Workmen's Compensation. The Ehrsams did not pay all of their rent because Mr. Woehrel had not repaired damage done to the house's plumbing by a flood in May. Mr. Woehrel had told them that he wanted to sell the house and they had agreed to show the house to any prospective buyers he sent over. However, on June 30, 1983, they first heard that Mr. Woehrel wanted them out of the house by a specific date.

Arriving home that night, they found the front porch littered with beer and liquor boxes along with a note telling them to move out. The note said that new tenants were moving in on July 2, 1983. Petitioner's husband called Mr. Woehrel and explained that his family had no place to go and could not move, but Mr. Woehrel would not accept that answer. Petitioner and her husband, after discussing the matter, brought the boxes inside the house to pack their belongings. During the next two days, working from newspaper ads, Petitioner and her husband made inquiries about new places to move to, but could not find anyplace available until July 15. They tried to call Mr. Woehrel on July 1 and 2 but could not reach him.

On July 3, around noon, Mr. Woehrel walked, unounced and uninvited, into the Ehrsams' house. With or on his breath and a staggering gait, he asked the sams why they had not packed everything. Petitioner's band responded that he could not find another place to and given his back problems (for which he needed an ation), and his two children, he would need more time nd another place to live. Mr. Woehrel then started to aten him with obscenities. Petitioner had emerged the kitchen into the dining room where her husband Mr. Woehrel were, but her efforts to calm things n only resulted in Mr. Woehrel threatening to kill her her husband. Petitioner's husband then told her to call police. She went next door to a neighbor's house, ed the call and returned. Petitioner explained to Mr. ehrel that she had called the police. At that point, Mr. ehrel offered the Ehrsams $200 to move out immediy. Petitioner's husband said that he wanted to think it the offer and told Mr. Woehrel to cool off and return 0 minutes. Mr. Woehrel subsequently left.

Trooper Donald Guy of the Pennsylvania State Police ved soon afterwards. Petitioner and her husband exned what had just transpired to the Trooper who erved that they were "shook up". He advised them that should take their problem to the local district justice next working day, July 5. He waited there for some 45 utes for Mr. Woehrel's return but then left.

After Trooper Guy left, a friend, John McCloskey, ped by the house. After the Petitioner's husband exned what had happened, he decided to stay longer than originally planned. Mr. McCloskey observed that the tioner was crying and her husband was upset.

ile Mr. McCloskey remained, a car pulled up to se and Mark Woehrel (Andrew Woehrel's son) the door with another person. Another vehicle had nto the area between the Petitioner's home and ne neighbor whose phone the Ehrsams used. Mark was carrying a vessel filled with a liquid that ike beer. Petitioner sent her two sons upstairs. etitioner's husband asked Mark Woehrel what he he replied that he was there to move the Ehrsams argument ensued. Petitioner threatened to call the Mark Woehrel, looking at the vehicle blocking the the neighbor's house, asked how she would place all. Seeing that the argument was escalating and rk Woehrel appeared to be attempting to enter the McCloskey picked up a shotgun that was lying near nd placed it within view of the door. (Petitioner had n in her house for her husband was planning to go hospital and the weapon would have provided a f protection in the isolated area which she lived.) point, another person standing at the door with Voehrel told him that they should leave for they t accomplishing anything. They subsequently left er's dwelling.

itioner, her husband and Mr. McCloskey, after dis- what to do next, decided to call Petitioner's sister- from the neighbor's house in order to reach Theo- raul, Petitioner's brother. While waiting for her to arrive, Petitioner went out to buy food and es. Mr. Praul arrived between 4:00 and 5:00 p.m.

. Praul removed a .22 rifle from his truck which he h him from target shooting. He showed the rifle to itioner's husband and Mr. McCloskey. During this

fired some rounds into the woods behind the same time, the Petitioner prepared to barbe- the front porch. They subsequently ate din- eighbor joined them for dinner.

g dinner, the Petitioner sent her sons upstairs Suddenly, Victor Jones, whom the Petitioner , walked in. Both her husband and brother e wanted, but he said nothing and started to into the dining room. Mr. Praul tried to orway to the dining room but Mr. Jones con- h his way in. Andrew Woehrel then came in at they were doing to his new tenant. At this nes grabbed the shotgun and ran to the door. d Mr. Woehrel to tell Mr. Jones to bring back when he did not do so, Mr. Praul shot out the the vehicle in which Mr. Jones and Mr. arrived with the .22 rifle. At about the same es had been yelling to Mr. Woehrel to get in eave with him. Petitioner's husband then ran car and tried to reach inside to grab the ch Mr. Jones had thrown into the car. While , half inside the car, tried to stop her husband ing the gun, Petitioner punched him. Mr. time was struggling with Mr. Jones outside tioner's husband eventually managed to re- n from the car and ran into the house.

he house, Petitioner's husband asked her for and she handed him two that were nearby. He otgun as Mr. Praul stood by the dining room denly, Mr. Jones came back into the house, Mr. Woehrel. Mr. Woehrel tried to grab the the Petitioner's husband and in the ensuing itioner's husband ended up on the floor with

oehrel standing over him, the barrel of the gun at his chest. Mr. Praul, who was struggling with nes, managed to hand his .22 to the Petitioner to Mr. Jones from getting it. Petitioner saw Mr. el pull the trigger of the shotgun, but it did not go ause the safety was on. When Petitioner saw Mr. el go for the safety, she asked him to leave her hus- one and when he did not desist, she shot him with

e prosecution's version of the incident differs in that contention of the State that the shooting was with- ovocation and that both the Petitioner and Andy el were outside the house. According to the prose- witnesses, Victor Jones went up to the Petitioner's o speak to the Petitioner and her husband. When to the door someone from inside opened the door inted a shotgun at Mr. Jones. Mr. Jones took the n and ran back to the car while the Petitioner's hus- nd brother tried to stop him. Mr. Woehrel, still in , saw a gun poked out of the window of the house eard some shots. At some point, Mr. Jones had the shotgun into the car, and the Petitioner's r, Mr. Praul, ran out of the house threatening to Mr. Woehrel's head off if he did not return the n. Mr. Woehrel said to take it and he next saw the ner run into the house with it. The Petitioner's hus- vas still wrestling with Mr. Jones when Mr. Praul to help him. Mr. Woehrel also heard air coming one of his tires. The Petitioner then threatened to Mr. Woehrel, who had gotten out of the car. As he l towards Mr. Jones, she threatened to shoot him, ough he raised his hands, she shot him anyway. Mr. el stumbled backwards and fell outside of the house

eh. The Petitioner's husband and brother at-
ender aid but were stopped by Mr. Jones,
attack them. The Petitioner in the meantime
lice. Mr. Jones again tried to charge into the
pped when Mr. Praul hit him with a baseball

(B) Procedural History

ember 15, 1983, Petitioner was found guilty of
ssault, Simple Assault, Recklessly Endanger-
Person and Possession of an Instrument of
ial by jury in the Court of Common Pleas of
ty, Pennsylvania, Honorable Leonard B.
siding. She was acquitted of Attempted Mur-

l Motions were filed and denied and Petition-
nced on May 17, 1985, pursuant to the provi-
nsylvania's Mandatory Minimum Sentencing
.S.A. §9712 as the District Attorney had giv-
the Commonwealth's intent to proceed under

oner's sentencing hearing, Judge Sokolove im-
nce upon Petitioner solely on the basis of
's Mandatory Minimum Sentencing Act.
ve clearly explained his basis for imposing
expressed his extreme frustration with being
nsider other factors in imposing sentence such
s lack of a prior criminal record, the effect the
uld have on the Petitioner and her husband
o young children, and whether the sentence

o prevent Petitioner from committing
ndix "A")

ioner was sentenced to a term of im-
0 years. Petitioner's subsequent Mo-
ion of Sentence was denied on June
iled a timely appeal to the Superior
a.

following oral argument and the sub-
iefs, the Pennsylvania Superior Court
t of the trial court. *Commonwealth v.*
erior Ct. 40, 512 A.2d 1199 (1986).

s presented on appeal and decided by
ere whether the Mandatory Sentenc-
Fourteenth Amendment's due process
Eighth Amendment's prohibition
usual punishment.

986, Petitioner filed a Petition for Al-
the Supreme Court of Pennsylvania.
entencing issue raised in the petition
t violated the Eighth Amendment's
ruel and unusual punishment. The
tion of the Fourteenth Amendment's
ment was not raised. On February 2,
Court of Pennsylvania denied the Peti-
Appeal.

, 1987, Petitioner applied to the Su-
sylvania for reconsideration of the de-
or Allowance of Appeal. On April 27,
Court of Pennsylvania denied Petition-
Reconsideration.

On August
filed a Petition
States District C
nia averring that
violates the due
ment of the Uni
the sentencing ju
the offense and
characteristics of
sentence. This P
and assigned to t
3, 1988, Judge M
Habeas Corpus
Writ of Habeas
has not exhauste
Therefore, we m
Habeas Corpus."
er's failure to
process claim in
stituted a circum
dies.

On June 13,
pursuant to Penn
the Court of Com
nia, requesting th
Appeal to the Su
Tunc in order to
process issue.

On July 29,
the right to file th
Pro Tunc. (Apper

ıent of the Case

7, Petitioner, with new counsel, of Habeas Corpus in the United the Middle District of Pennsylva- ındatory Minimum Sentencing Act clause of the Fourteenth Amend- es Constitution in that it prohibits ɔm considering relevant facts about the individual circumstances and fendant in imposing an appropriate was docketed to Civil No. 87-1108 ıorable Malcolm W. Muir. On May ıied Petitioner's Petition for Writ of ıding that "Ehrsam's Petition for contains a claim as to which she available state judicial remedies. ıiss her entire Petition for Writ of Muir concluded that the Petition- ıer Fourteenth Amendment due tition for Allowance of Appeal con- n of available state judicial reme-

Petitioner filed a Petition for Relief ia's Post-Conviction Hearing Act, in Pleas of Bucks County, Pennsylva- t to file a Petition for Allowance of Court of Pennsylvania Nunc Pro the Fourteenth Amendment due

Judge Sokolove granted Petitioner ition for Allowance of Appeal Nunc F")

Statement of the Case

On August 26, 1988, Petitioner filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania. The issue raised was whether Pennsylvania's Mandatory Minimum Sentencing Act violates the due process clause of the Fourteenth Amendment to the United States Constitution.

On April 27, 1989, the Pennsylvania Supreme Court denied the Petition for Allowance of Appeal and it is from this Order that Petitioner seeks a Writ of Certiorari. (Appendix "G")

VI. ARGUMENT

Reason For Allowance Of Writ

The Pennsylvania Mandatory Minimum Sentencing Act violates the due process clause of the Fourteenth Amendment to the United States Constitution in that it prohibits the sentencing judge from considering relevant facts about the offense and the individual circumstances and characteristics of the defendant in imposing an appropriate sentence and places in the hands of the prosecutor unbridled discretion in determining which defendant will be subject to the mandatory penalties contained therein.

Although this Court has had the occasion to rule upon the constitutionality of this statute, the constitutional issue presently raised by Petitioner was not decided on that occasion. *See McMillan v. Pennsylvania,* 477 U.S. 79 (1986).

This Court should grant this Petition for a Writ of Certiorari pursuant to Rule 17.1(c) in that the Pennsylvania state courts have decided an important question of federal law which has not been, but should be, settled by this Court.

The Fourteenth Amendment to the United States Constitution provides as follows, *inter alia:*

> No state shall ... deprive any person of life, liberty, or property, without due process of law.

In *Williams v. New York,* 337 U.S. 241, 247-48 (1949), this Court wrote:

Argument

> Undoubtedly, the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime ... The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender ... Today's philosophy of individualizing sentences makes sharp distinctions for example between repeat and first offenders ... This Court has said: 'It is necessary to individualize each case, to give that careful, humane, and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion. [Citations omitted.] For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.

Subsequent cases have indicated that sentencing procedures must comport with due process. "It is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the due process clause." *Gardner v. Florida*, 430 U.S. 349, 358 (1977). "The due process clause applies to sentencing procedure." *Williams v. New York, supra; Commonwealth v. Shoemaker*, 226 Pa. Superior Ct. 203, 313 A.2d 342 (1973). And *Commonwealth v. Opara*, 240 Pa. Superior Ct. 511, 362 A.2d 305 (1976).

As is indicated in that portion of *Williams v. New York* quoted *supra*, the due process clause should require sentences to be individualized to the circumstances. Yet such individualization was denied in the present case because

42 Pa. C.S.A. §9712 mandated the minimum sentence. *Williams v. New York*, *supra*, says that:

> Justice generally requires ... that there be taken into account ... the character and propensities of the offender.

However, Petitioner's character and propensities were *not* taken into account in this case. Her sentence was five years minimum, regardless of her character, her propensities, or any other circumstances in her individual case.

The holding in *Williams v. New York*, *supra*, was reiterated in *Lockett v. Ohio*, 438 U.S. 586, 602 (1978):

> We begin by recognizing that the concept of individualized sentencing in criminal cases generally, although not constitutionally required, has long been accepted in this country. See Williams v. New York, 337 U.S. at 247-48, 69 S.Ct. at 1083; Pennsylvania Ex Rel. Sullivan v. Ashe, 302 U.S. 51, 58 S.Ct. 59, 82 L.Ed. 43 (1937). Consistent with that concept, sentencing judges traditionally, have taken a wide range of factors into account. ... but the definition of crimes generally has not been thought automatically to dictate what should be the proper penalty. ... It generally has been agreed that the sentencing judges 'possession of the fullest information possible concerning the defendant's life and characteristics is highly relevant—if not essential—to the selection of an appropriate sentence ...'

The importance of individualized sentencing has been recognized in several federal cases. In *United States v. Barker*, 771 F.2d 1362, 1365 (9th Cir. 1985) the court stated:

Argument

Few legal principles are either as ancient or eeply etched in the public mind as the notion that nishment should fit the crime. This familiar maxi- um, however, is only half true. 'In the present cen- ry the pendulum has been swinging away from ... e philosophy that the punishment should fit the ime and toward one that the punishment should also the criminal.' W. LaFave and A. Scott, *Handbook n Criminal Law*, §5 at 25 (1972). ... The concept of dividualized sentencing is firmly entrenched in our resent jurisprudence. ... In each case, a criminal ntence must reflect an individualized assessment of particular defendant's culpability rather than a echanistic application of a given sentence to a given tegory of crime. ...

n *United States v. Lopez-Gonzales*, 688 F.2d 1275 ir. 1982), the District Court's sentence was vacated the court stated that it automatically imposed the um sentence whenever an illegal alien was appre- d after flight and pursuit. The Ninth Circuit Court :

The exercise of sound discretion requires consid- ration of all the circumstances of the crime ... The entencing judge is required to consider all mitigating nd aggravating circumstances involved. There is a trong public interest in the imposition of a sentence ased upon an accurate evaluation of the particular of- ender and designed to aid in his personal rehabilita- ion. Thus, appellate courts have vacated sentences eflecting a preconceived policy always to impose the naximum penalty for a certain crime.

This was also the case in *United States v. Daniels*, 446 967, 971 (6th Cir. 1971). There the court stated:

> A trial court which fashions an inflexible practice n sentencing contradicts the judicially approved olicy in favor of 'individual sentences'. Williams v. New York, 337 U.S. at 248 ... Moreover, such an inlexible sentencing practice is incompatible with the Jnited States Supreme Court's declaration in Wiliams v. Oklahoma, 368 U.S. at 585 that: Necessarily, he exercise of a sound discretion in such a case required consideration of all the circumstances of the rime for the 'belief no longer prevails that every ofense in a like legal category calls for an identical punshment [without regard to the past life and habits of he particular offender]'. Williams v. State of New ork, supra, [337 U.S.] at [page] 247, 69 S.Ct. at page] 1083. In discharging his duty of imposing a roper sentence, the sentencing judge is authorized, f not required, to consider all of the mitigating and ggravating circumstances involved in this crime.
>
> We are unable to understand how the trial judge ould have fairly considered all of the circumstances urrounding the commission of the crime and the past ife and habits of the appellant that he is obliged to onsider and impose the identical punishment he has been handing down for 30 years in 'cases of this kind'.

This due process argument is now raging through the al courts regarding the new sentencing guidelines. question is whether the guidelines impinge too much e judge's discretion in individualizing a sentence. The ving district courts have held the sentencing guide- unconstitutional on due process grounds: *United*

v. Alvarez, 690 F. Supp. 1303 (S.D. N.Y. 1988); *States v. Bolding*, 683 F. Supp. 1003 (D. Md. 1988) *nc*); *United States v. Brittman*, 687 F. Supp. 1329 Ark. 1988); *United States v. Brodie*, 686 F. Supp. . D.C. 1988); *United States v. Elliot*, 684 F. Supp. D. Colo. 1988); *United States v. Lopez*, 684 F. Supp. C.D. Cal. 1988) (*en banc*); *United States v. Martinez-*, 684 F. Supp. 634 (D. Idaho 1988); *United States v.* 685 F. Supp. 990 (W.D. Tex. 1988); *United States v.* 688 F. Supp. 1483 (D. N.M. 1988); *United States v.* 688 F. Supp. 542 (W.D. Mo. 1988).

he following district courts have held that the sen- g guidelines do not offend the due process clause: *l States v. Rodriguez*, 691 F. Supp. 1252 (W.D. Mo. *United States v. Seluk*, 691 F. Supp. 525 (D. Mass. *United States v. Belgard*, 694 F. Supp. 1488 (D. 1988); *United States v. Landers*, 690 F. Supp. 615 Tenn. 1988); *United States v. Kerr*, 686 F. Supp. (W.D. Pa. 1988); *United States v. Alves*, 688 F. Supp. . Mass. 1988); *United States v. Amesquita-Padilla*, F. Supp. 277 (W.D. Wash. 1988); *United States v. rdson*, 685 F. Supp. 111 (E.D. N.C. 1988); *United s v. Weidner*, 692 F. Supp. 968 (N.D. Ind. 1988).

These lists may not be all inclusive and most of the are on appeal in the circuit courts. However, as this t can see by the myriad decisions made by the various al judges, this issue must be resolved.

The Pennsylvania Act in question is even more re- ive than the Sentencing Reform Act of 1984. In fact, sentencing judge has discretion under the federal elines since he is dealing with sentence ranges. Under Pennsylvania Act there are no ranges, simply a definite ence for certain crimes.

his Court recently held:

> It is now well established that a judge or other entencing authority is to be accorded very wide discretion in determining an appropriate sentence. The entencing court or jury must be permitted to consider any and all information that reasonably might bear n the proper sentence for the particular defendant, ven the crime committed. ... Allowing consideration such a breadth of information ensures that the punhment will suit not merely the offense but the individual defendant.

an v. United States, 468 U.S. 559 (1984).

ennsylvania courts also have recognized the importof individualizing a sentence to the circumstances of ase. In *Commonwealth v. Martin*, 466 Pa. 118, 132, 2d 650 (1976), the Pennsylvania Supreme Court exed the Lancaster County Common Pleas Court for predetermined a sentence (3 years imprisonment) pplied in all cases of a particular type (heroin delivegardless of the individual circumstances.

> The procedures employed by the sentencing ourt in the appeals before us today ignore the basic remises of Pennsylvania individualized sentencing. ere, as in [Commonwealth v.] Green, 396 Pa. 137, 51 A.2d 241 (1951) the nature of the criminal act was sed as the sole basis for the determination of the ngth of sentence ...

he *Martin* decision implies that individualized sen- is an absolutely essential ingredient to a fair pro- and that its absence constitutes an intolerable de-y. The Pennsylvania Supreme Court in *Martin* is

iticism of the three Lancaster County judges
pon themselves to predetermine a particular
particular type of offense. Petitioner submits
onduct by judges is so obviously outrageous,
conduct by Pennsylvania's legislature, even if
ageous, is at least inconsistent with the kind
l fairness which the due process clause of the
mendment has historically required. Individ-
ncing has become so deeply entrenched in
stem that this Court should now require it as
lue process.

g arguendo that the Pennsylvania Mandatory
ntencing Act is not unconstitutional because
does not require individualized sentencing,
er would submit that a second due process
virtue of the Pennsylvania Supreme Court's
Commonwealth v. Pittman, 515 Pa. 272, 528
87). There the Pennsylvania Supreme Court
e minimum sentencing provisions of 42 Pa.
do not apply absent the filing of a notice by
wealth of its intention to proceed under this

ng to *Pittman,* the District Attorney has the
n to control the applicability of a mandatory
ntence in any given case. Thus, he performs
at of prosecutor and judge, since he has the
trol the minimum sentence by filing the no-
certainly true in the case at bar and Judge
ressed his disdain and displeasure in having to
mandatory minimum sentence and indicated
d not impose such a sentence were it not for
Attorney filing the notice. (Appendix "A")

violation of the due process clause of the
nendment which requires fair trials before
nals. In *Withrow v. Larkin*, 421 U.S. 35
urt stated:

edly, a 'fair trial in a fair tribunal is a basic
nt of due process.' In Re Murchison, 349
136, 75 S.Ct. 623, 625, 99 L.Ed. 942
is applies to administrative agencies which
as well as to courts. Gibson v. Berryhill,
564, 579, 93 S.Ct. 1689, 36 L.Ed. 2d 488
t only is a bias decision maker constitution-
eptable but 'our system of law has always
d to prevent even the probability of unfair-
Re Murchison, supra, 349 U.S. at 136, 75
625; Cf. Tumey v. Ohio, 273 U.S. 510, 532,
437, 444, 71 L.Ed. 749 (1927).

sylvania Supreme Court's interpretation of
Minimum Sentencing Act violates the very
ow and *Murchison, supra*, in that the prose-
ridled discretion as to whether to invoke
lso the person representing the interests of
ealth of Pennsylvania and certainly one who
st the defendant. The prosecutor is the "bias
r" who is "constitutionally unacceptable,"
ra, to determine what minimum sentence
osed in any given case.

rt's decision in *United States v. Batchelder*,
1979) is distinguishable from *Pittman, supra*
does nothing to support *Pittman*. There, this
at there is no denial of due process where a
cides to prosecute an individual under a
carries a greater maximum penalty when a

e, carrying a shorter maximum penalty, is . However, the crucial difference is that carried a mandatory minimum penalty. The was in the statutes' maximum penalties. g judge's role in deciding what penalty to t affected.

ningling of the prosecutorial and adjudica- created by the Pennsylvania Supreme etation of the Mandatory Minimum Sen- a blatant violation of our most precious and to due process under the law, i.e., the right ntence imposed by an impartial body.

VII. CONCLUSION

asons stated above, it is urged that the Peti- d or, in the alternative, that the Pennsylva- Court be summarily reversed.

Respectfully submitted,
CAMPANA & CAMPANA
PETER T. CAMPANA
ANGELA C. LOVECCHIO
Attorneys for Petitioner

et
PA 17701

Appendix A

APPENDIX "A"

URT OF COMMON PLEAS OF BUCKS
COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

NO. 3400/1983

ALTH OF PENNSYLVANIA

vs.

CHRSAM,

Defendant

NSCRIPT OF SENTENCING HEARING
OF MAY 17, 1985

COURT: You may.

---

reupon Mr. Wilder, attorney for the defen-
ented closing remarks to the Court.)

---

reupon Mr. Finley, attorney for the Com-
n, presented closing remarks to the Court.)

URT: Okay. One aspect of this case is man-
ing. Obviously, by its very nature and defi-
s from me any discretion. This whole case is
verybody concerned, and we all have roles
e parties themselves, obviously, the Legisla-
moved from the Judiciary the opportunity to
lance the responsibility of the individuals,

ution to these kinds of prob-
upon itself to sentence peo-
out cases, not knowing any-
ne sentence or another, but
terrible danger, the terrible
ny offense involving a weap-
tomatically have a minimum
years. That was the problem.
el with, because you take a
for the exercise of some dis-
it.

l questions which you have
Application of the Mandatory
to deny that motion because
ision in this case will be of no
Constitutionality of the manda-
be decided by the Appellate
dy been some decisions both
his Commonwealth. I am just
inion in that regard.

mandatory sentencing I have
past, and I will express it to-
I think it's a disaster. It takes
eone is injured, harmed, un-
resumably unjustifiably—and
fy that tragedy to other inno-
young children who will be
years. They had nothing to do

to account the previous crimi-
t, to not be able to consider
ll have on her the rest of her

life, or whether or
committing other
things. Judges aren
who has that discre
ney's Office who de
dant on notice of th
tice weren't given
the imposition of
like to ask Mr. Finl
factors did you use
be curious. Not tha
but why does the
who is not in ope
reasons for decidin
why is that done pu
lature decides the
reasons for its sente
am curious to know
can explain to me
serve this notice.

MR. FINLEY
sonable notice be
fense counsel. I do
which I have provi
notice, but I want-

THE COURT:
don't misunderstan
sent it. I'm curious
nation to send it is
sent the sentence

MR. FINLEY:

ppendix A

necessary to prevent her from
, I can't think of any of those
ble of doing that. The only one
somebody in the District Attor-
whether or not to place a defen-
cation of this act, and if that no-
efendant wouldn't be subject to
ndatory sentence. And I would
exercised that discretion—what
ding to send this notice? I would
were necessarily right or wrong,
t Attorney's Office, or someone
t or does not have to give his
ther or not to send the notice,
a clerical matter? But the Legis-
shouldn't do it and expresses its
open Court and publicly, and I
lon't have to, but if you wish you
factors you used in deciding to

equired by the statute that rea-
d by the Commonwealth to de-
elieve that that particular notice
necessary, just simply reasonable

urse, that is an issue, and please
I'm not criticizing you for having
ow on what criteria the determi-
. Do you agree that if it weren't
not be imposed?

not agree with that.

THE COURT: Well, that is a matter that will be determined again by the Appellate Courts. It was my understanding the Act required it, or certainly that due process requires it, so that therefore if you hadn't sent it I couldn't impose the sentence; you agree with that?

MR. FINLEY: I agree that due process and legislation requires me to notify defense counsel.

THE COURT: All right. Let the record be clear that were it not for the Act I would not impose this sentence. Precisely what sentence I would impose I can't and won't say at this time. I would take into account other factors which aren't before me. I have no choice to consider those factors, and therefore I will impose the sentence that the law presently says I must impose. Or put another way, I am not imposing this sentence, the General Assembly of the Commonwealth of Pennsylvania is imposing this sentence.

Do you want to bring the defendant before me?

(Short pause.)

THE COURT: In Criminal Action Number 3400 of 1983, the defendant is committed to a penal institution for the Commonwealth of Pennsylvania for a term of five to ten years.

MR. WILDER: Your Honor—

THE COURT: Yes.

MR. WILDER: —I was going to advise the defendant of her rights if you are finished.

THE COURT: I was about to do that, but you can do so.

MR. WILDER: I want to inform you you have the right within thirty days of this date to appeal this sentence and the conviction to the Superior Court. That appeal must be filed with the Court of Common Pleas in Bucks County, and if you wish to be represented by counsel you may be. If you cannot afford counsel the Public Defender's Office will continue to represent you.

In addition, you have ten days from this date to file a motion for reconsideration of sentence with Judge Sokolove. Any and all grounds for reconsideration of that sentence must be listed in that motion for reconsideration of sentence, or else they will be waived ...

Appendix B

APPENDIX "B"

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA
V.
KATHLEEN EHRSAM

NO. # 3400/1983

ATTORNEY ID # 30046

MOTION FOR RECONSIDERATION OF SENTENCE

TO THE HONORABLE, THE JUDGES OF SAID COURT:

The motion of Kathleen Ehrsam, by her attorney, Stuart Wilder, Assistant Public Defender, respectfully submits that:

1. She is the defendant in the above-captioned case.

2. On May 17, 1985, she was sentenced by the Honorable Leonard B. Sokolove of the Bucks County Court of Common Pleas to serve a term of incarceration of not less than five nor more than ten years in a state correctional institution.

3. Said sentence is illegal because the statute requiring the sentence of not less than five nor more than ten years, 42 Pa. C. S. §9712, is defective in that:

a. The Commonwealth's notice of its intention to request the application of the mandatory sentence was inade-

quate because specific notice of the invocation of the mandatory sentencing statute and the acts which must be established to trigger such penalties, must be provided in the indictment or information. Such notice is necessary to invoke the jurisdiction of the court in cases involving mandatory penalties. The application of the mandatory penalties without such adequate notice violates fundamental Pennsylvania and federal due process rights. U.S. Const. Amend. XIV; Pa. Const. Article I, §§1 and 9.

b. The notice furnished in the case at bar is constitutionally inadequate under the due process clauses of both the Federal and Pennsylvania Constitutions because it fails to set forth with particularity the particular firearm, the circumstances under which it was visibly possessed and the particular offense during which it was possessed.

c. The statute in question specifies a burden of proof on the Commonwealth by a preponderance of the evidence at the sentencing hearing. The statute is unconstitutional on its face pursuant to U.S. Const. Amend. V, VI, XIV, Pa. Const. Article I, §§1 and 9, in that it does not require the specific operative facts to establish the defendant's exposure to the specific mandatory penalties be proven beyond a reasonable doubt. Even if a reasonable doubt standard were not to be constitutionally required, some burden greater than a simple preponderance of the evidence is required to satisfy due process. This burden of proof provision also violates Pa. Const. Article II, §1, Article III, §1, and Article V, §10(c) in that it infringes on the Supreme Court's exclusive power to regulate practice and procedure in the courts.

d. The statute denies the defendant her state and federal constitutional rights to due process and trial by ju-

.S. Const. Amend. V, VI, XIV, Pa. Const. Article I, nd 9, as it allows the Commonwealth to establish dis- specific facts concerning the offense either at trial or ntencing hearing without specific notice to the defen- when and how those facts would be determined, and allows such specific facts to be determined by the e, deprive the defendant of her right to trial by jury.

e. The statute is unconstitutional on its face because es not require the Commonwealth to give notice of its ntion to proceed under this mandatory proceeding te until after conviction. Pa. Const. Article I, §9. An vidual is entitled to notice beforehand of the nature purpose of the proceedings against him. If a manda- sentencing statute is invoked, the judge is required at sentencing hearing to consider the evidence offered at to determine whether the mandatory provision ap- s. The defendant is entitled to know before trial wheth- he evidence offered at trial will be considered only for purposes of the issue to be decided at trial or whether to serve the dual and different purpose of also being in tical terms the commencement of the mandatory sen- ing hearing where evidence is being received in the nt the defendant is convicted. The statute is unconsti- onal being violative of due process of law, the right to nsel and effective assistance of counsel and the right to front and cross-examine witnesses.

f. The mandatory sentencing statute is invalid on its under due process grounds, U.S. Const. Amend. V, , Pa. Const. Article I, §1, as it gives complete, exces- , unguided, and unreviewable discretion to the prose- or to decide which cases should be subjected to pos- e mandatory sentences by making a mandatory sen- ce dependent on the Commonwealth providing notice ntention to proceed.

g. The statute denies the defendant her basic and mental due process right under Pa. Const. Article I, have the sentence determined only after considera- f individual factors relating to the defendant's circum- es and condition, and violates the constitutional sepa- of powers doctrine by improperly interfering with ower of the judiciary over the sentencing process. Pa. t. Article V.

n. The provisions of the statute allowing the Com- vealth to present any additional evidence at sentenc- establish its right to enhancement violates state and al notions of due process, double jeopardy, and collat- estoppel. U.S. Const. Amend. V, VI and XIV, Pa. t. Article I, §9 §13. Where specific discrete facts must oved to establish either an offense or defendant's lia- for enhanced punishment particularly with such facts rning commission of the alleged offense and deter- the gravity of the offense and the degree of culpabili- e Commonwealth must be required to establish them al, and beyond a reasonable doubt to the satisfaction of rier of fact or the judge or jury. Allowing the Com- vealth to supplement its evidence at the sentencing or placing the burden on the defendant to disprove facts is unconstitutional.

i. The statute is constitutionally invalid under Pa. t. Article II, §1 and Article II, §1, because it violates eparation of powers doctrine. Pursuant to the provi- of the statute, the prosecutor can and does decide h defendants will be subjected to the possible imposi- of a mandatory sentence as the prosecutor's notice of tion to proceed under the mandatory sentencing act e necessary triggering factor for the applicability for

e mandatory sentencing act and the imposition of a man-
tory sentence. Imposition of sentence within the limits
escribed by the legislature is purely judicial function and
ce the legislature had prescribed the punishment for a
rticular offense it cannot within constitutional para-
eters delegate to the prosecutor the absolute discretion
determine by the granting of notice whether a manda-
y sentence may or may not be applied.

4. The mandatory sentencing statute, 42 Pa. C. S.
712, enabled this Court to impose a sentence that had a
aximum term of five years, and did not require solely a
ntence with a minimum term of five years.

For the reasons above, the defendant respectfully re-
ests this Honorable Court to reconsider the sentence it
posed in the above-captioned case.

Respectfully submitted,
/s/ Stuart Wilder
Stuart Wilder
Assistant Public Defender

Appendix C

APPENDIX "C"

THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

MMONWEALTH OF PENNSYLVANIA

vs.

THLEEN EHRSAM,

Defendant

NO. 3400/1983

ORDER

AND NOW, this 11th day of June, 1985, Defendant's ion for Reconsideration of Sentence is hereby denied.

BY THE COURT,

/s/ Leonard B. Sokolove, J.

Appendix D

APPENDIX "D"

SUPERIOR COURT OF PENNSYLVANIA

No. 01408 Philadelphia 1985

WEALTH OF PENNSYLVANIA

vs.

N EHRSAM, Appellant

m the Judgment of Sentence of the Court of leas of Bucks County, Criminal, at No. 3400/1983.

FILED JUL-9 1986

ROWLEY, MONTEMURO AND KELLY, JJ.

BY MONTEMURO, J.:

ppeal presents multiple claims alleging ineffec- trial counsel, errors in the court's charge to the nconstitutionality of section 9712 of the Manda- mum Sentencing Act,[1] and error in the court's order disclosure to the defense of certain notes the complainant during the trial.

llant, Kathleen Ehrsam, was charged with at- nomicide,[2] aggravated assault,[3] simple assault,[4] endangering another person,[5] and possession of ient of crime.[6] She was tried before a jury and,

C. S. §9712.
C. S. §901 and §2501.
§2702.
§1701.
§2705.
§907.

Appendix D

er 15, 1983, was found guilty of aggravated as-
e assault, recklessly endangering another per-
session of an instrument of crime. Following
of post-verdict motions, appellant was sen-
term of imprisonment of five to ten years.
appellant filed a timely motion for reconsidera-
ence, which was denied. This appeal followed.

al court correctly summarized the pertinent
case as follows:

July 3, 1983, Andrew Woehrel was shot by
nt [appellant] at a rental property owned by
el. The property, which was located in Kint-
e, Bucks County, Pennsylvania, had been rent-
defendant and her husband, Edwin Ehrsam,
eir family for a period of approximately one
ior to the incident. The Ehrsams had fallen
in their rent payments and had been advised
ehrel in May, 1983 that he wanted to obtain
nants by July, 1983. The Ehrsams had indicat-
Woehrel that they would vacate the premises by
1983. When the Ehrsams did not vacate the
es as promised, Woehrel offered to help them
The Ehrsams said they would discuss it and get
him.

July 3, 1983, not having received a response
offer, Woehrel drove to the rented property at
ne to discuss the situation. A heated argument
between Woehrel, Edwin Ehrsam and defen-
ith the Ehrsams telling Woehrel they would
ve voluntarily and that Woehrel would have to
hem. Defendant threatened to call the police.
el offered to assist the Ehrsams monetarily, and

g them to camp on his other property which ocated nearby. Edwin Ehrsam promised to o him later that day.

afternoon, Woehrel asked his son, Mark, friend, Paul McBride, to stop by the Ehre whether they had decided to leave. When , Mark discussed the situation with defenband. Defendant thereafter accosted Mark nd threatened to shoot them if they didn't porch.

while, Woehrel had asked a friend, Vic accompany him to the Ehrsams. Woehrel that Jones impersonate a prospective tenant operty. Jones refused, but did agree to go hrel to discuss the situation with the Ehrn and to offer them the use of his van in ones owned rental properties and had prior e in handling recalcitrant tenants.

nrel and Jones drove to the Ehrsams in car and parked it next to hedgerows in front use. Woehrel testified that Jones knocked on and then he heard Jones yell "Hey, what are g?" Jones then ran to the car holding a shoth he threw in the backseat. [Jones testified at he had grabbed the shotgun from appelband.] Defendant and her husband were on of the house. A scuffle ensued where defen her husband attacked Jones and attempted the shotgun. Woehrel then saw an individu identified as defendant's brother, Ted Praul, 22 rifle out of a window and shoot at the car ul then left the house and threatened to blow

head off if the shotgun wasn't returned. then took the shotgun into the house.

el got out of the car to help Jones. As he the house, defendant came out of the the porch pointing the .22 rifle at Defendant threatened to shoot Woehrel and ut further warning shot him. The bullet hrel in the side then travelled to his spine. ied that he heard Woehrel cry "Oh, I'm m shot" and then he saw Woehrel lying on in front of the porch. The result of the ound paralyzed Woehrel from the waist necessitated lengthy hospitalization and re- treatments.

nion at 1-4.

version was somewhat different. While not e had shot Woehrel, appellant testified that the dining room inside the house when curred. Accordi g to appellant, Jones and their way into the house and in an ensuing band ended up lying on the floor with ng over him pointing a shotgun at her hus- ppellant testified that, after she observed ze the trigger of the shotgun, she shot him er rifle. She stated that Woehrel fell back nt door, staggered a few steps onto the n fell to the ground. N.T. December 14, 3.

cated above, appellant raises the following al: (1) defense counsel was ineffective; (2) in charging the jury that appellant had a (3) the court erred in failing to charge the

orch was part of the dwelling; to charge the jury that a land- to remain on leased property essee; (5) section 9712 of the encing Act is unconstitutional efusing to order the Common- efense the contents of certain made during the trial.

OF TRIAL COUNSEL

ltiple claims of defense coun- we will consider *seriatim*.

effectiveness of counsel, the her the issue/argument/tactic and which forms the basis for ss, is of arguable merit. This is be considered ineffective for aim. *Commonwealth v. Pursell*, (1985). If the underlying claim ve then ask whether counsel's a reasonable basis designed to sts. *Commonwealth v. Broad-* 479 A.2d 526 (1984). Finally, ve, to prevail on appeal the ap- ineffectiveness so prejudiced him (her) of a fair trial. *Com-* Pa. Super. 324, 498 A.2d 423

n of ineffectiveness regards o the introduction of what ap- obtained evidence. Appellant l photographs of the interior of fficers who arrived on the scene

shortly after the search of the hou tions as to their

Our review lying claim has no valid basis for Although as a ge without a warran al purposes, the igent circumstan Pa. 93, 389 A.2 where the need ther because evi be destroyed or 389 A.2d at 106, cal harm to poli *Commonwealth* A.2d 616, 618 (present in the i

When police the shooting, the trator and that s pression Hearin Since the officers shot one person, as that of other house. Once ins

[7] One of the off of the house, he saw boys, later identified ber 12, 1983, at 35. of great concern to

ing and conducted a warrantless
e also refers to the officers' recollec-
vation of the interior of the house.

record convinces us that the under-
uable merit inasmuch as there was
essing the aformentioned evidence.
ule a search and seizure conducted
emed unreasonable for constitution-
t requirement is excused where ex-
ist. *Commonwealth v. Holzer*, 480
(1978). Such circumstances arise
mpt police action is imperative, ei-
sought to be preserved is likely to
ted from investigation, *id.* at 102,
cause there exists a threat of physi-
cers or other innocent individuals,
kson, 315 Pa. Super. 23, 27, 461
We believe both conditions were
case.

rs arrived on the scene shortly after
e told that appellant was the perpe-
s still inside the house. N.T., Sup-
cember 12, 1983, at 13-14, 34-35.
been told that appellant had already
lerations for their own safety as well
arly justified their entry into the
ney were entitled to seize items in

tified that when he peered in the front door
nt standing on the stairway with two young
children. N.T. Suppression Hearing, Decem-
ety of those children would clearly have been
ce.

plain view. "[T]he police may seize any evidence that is in plain view during the course of their legitimate emergency activities." *Mincey v. Arizona*, 437 U.S. 385, 393 (1978). *See also, Commonwealth v. Sourbeer*, 492 Pa. 17, 422 A.2d 116 (1980) (Flaherty, J., with three justices concurring). The photographs, measurements, and officers' recollections which were admitted into evidence were all of readily observable features of the interior of the house.[5] The items seized were thus in plain view.

The warrantless search was additionally justified by a need to insure that evidence of the crime was not removed or destroyed. The officers had been told that shots had been fired from the house, and it was certainly reasonable for them to enter the house as soon as possible in order to prevent appellant or anyone else who might be inside from secreting either the weapon involved or bullet casings.

We conclude that as the warrantless search fell within the exigent circumstances exception to the necessity to obtain a warrant, no valid basis existed for suppressing the challenged evidence. Thus, defense counsel was not ineffective in failing to assert a baseless claim. *Commonwealth v. McNeil*, 506 Pa. 607, 487 A.2d 802 (1985).

Appellant's next allegation of counsel's ineffectiveness is based on counsel's failure to request that closing arguments be transcribed. The sole authority which appellant cites is *Commonwealth v. Crowther*, 241 Pa. Super. 446, 361 A.2d 861 (1976), which stands for the narrow proposition that when there is a question of ineffectiveness, new counsel must examine the entire record for evidence of

---

[5] For example, the photographs showed bullet casings lying on the floor and a slug embedded in a wall. The measurements showed the dimensions of rooms, as well as those of the front porch.

such ineffectiveness. Appellant argues, somewhat obliquely, that if closing arguments had been transcribed, new counsel might have discovered evidence of trial counsel's ineffectiveness therein. According to appellant, trial counsel was thereby ineffective for not providing the means whereby new counsel might have uncovered additional examples of trial counsel's ineffectiveness.

We find this argument to be without merit. Appellant would have us impose a per se obligation on defense counsel to always request that closing arguments be transcribed, failing which counsel would be held automatically ineffective. We have found no case which imposes such an obligation, and we decline to do so. Finding the underlying claim possesses no arguable merit, we therefore conclude trial counsel was not ineffective in this regard.

Appellant next argues that counsel was ineffective for not adequately cross-examining the Commonwealth's expert witness on a crucial point of testimony. Appellant refers to Dr. Michael Rhodes, a specialist in traumatology, who testified as to the nature of the victim's wounds, and gave his expert opinion that the immediate effect of the bullet striking the victim would have been to cause him to drop immediately. This testimony supported the Commonwealth's theory that the victim, who was discovered by paramedics lying on the sidewalk about two feet from the front porch, was shot while outside the house. Appellant claims counsel did not question Dr. Rhodes vigorously enough in an attempt to discredit this testimony. As stated *supra*, it was appellant's contention that the victim was shot while he was inside the house, and then staggered onto the porch from which he fell to the ground.

We have carefully examined that portion of the transcript covering defense counsel's cross-examination of Dr. Rhodes on this point, and find that it simply does not support appellant's contention that the cross-examination was inadequate. Defense counsel was able to elicit from Dr. Rhodes a statement that the victim might have been able to take a step after being shot, as well as an admission from Dr. Rhodes that his opinion that the victim would have dropped immediately was merely a guess, based on scientific experience. N.T. December 13, 1983, at 172-173. Defense counsel's cross-examination of Dr. Rhodes was more than adequate, and we accordingly find no ineffectiveness in this regard.[9]

Appellant next argues counsel was ineffective for failing to object to the admission of allegedly hearsay evidence, consisting of testimony from a rescue squad attendant, and from one Paul McBride, a friend of the victim's son, who was present at the scene shortly before the shooting.

The record reveals that the rescue squad attendant testified that when she arrived at the scene shortly after the shooting, she found the victim lying on the ground and that the victim, who was upset and agitated, stated, "She [appellant] stuck the gun out of the door and shot me before I got my foot up to the step." N.T. December 13, 1982, at 83.

---

[9] Appellant also avers that counsel should have called in an expert witness for the defense to testify as to whether the victim would have been able to move after being shot. There was no necessity for this action, given the responses which defense counsel was able to elicit from Dr. Rhodes.

We find that the underlying claim possesses no arguable merit since the above statement was clearly admissible under the excited utterance exception to the hearsay rule. To come within this exception, a statement must be:

> [A] spontaneous declaration by a person whose mind has been suddenly made subject to an overpowering emotion caused by some unexpected and shocking occurrence, which that person had just participated in or closely witnessed, and made in reference to some phase of that occurrence which he perceived, and this declaration must be made so near the occurrence both in time and place as to exclude the likelihood of its having emanated in whole or in part from his reflective faculties.

Commonwealth v. Pronkoskie, 477 Pa. 132, 137-38, 383 A.2d 858, 860 (1978) (citation omitted). In the instant case the victim, who was upset and agitated at the time, made the statement shortly after having been shot, an unexpected and shocking occurrence which would surely have caused him to be subject to overpowering emotion. The statement was, in addition, made at the place where the shocking event occurred and was in reference to that event. Given the clear admissibility of the statement, it would have been futile for defense counsel to have objected to its admission.

Appellant also claims defense counsel should have objected, on the basis of inadmissible hearsay, to Paul McBride's testimony that after appellant threatened to shoot Mark Woehrel (the victim's son), appellant's husband said, "Don't push her. She'll do it." N.T., *supra* at 94. The Commonwealth responds that, since the parties were arguing at the time, this statement also falls within the excit-

l utterance exception. We cannot agree. This statement as made *prior* to the shooting, and we cannot find that e fact that the parties were arguing brings the statement ithin the ambit of the excited utterance exception. The cord does not support a conclusion that appellant's hus- and's statement resulted from "overpowering emotion used by some unexpected and shocking occurrence." *ommonwealth v. Pronkoskie, supra* at 137-138, 383 A.2d 860. Since the statement was inadmissible hearsay, the nderlying claim of this allegation of ineffectiveness has ar- uable merit. We next ask whether counsel could have had ny reasonable basis for failing to object to the statement's dmission. We cannot perceive any such basis, but our in- ffectiveness analysis does not end at this point. The final uestion is whether appellant has established, as she must nder *Commonwealth v. Pierce, supra,* that she suffered rejudice from the statement's admission. Since there was ore than enough evidence supporting the Common- ealth's version of the shooting, the erroneous admission of ppellant's husband's statement was a mere trifle which an in no way be construed as having denied appellant a ir trial. Appellant accordingly cannot prevail on this aim.

Appellant's final allegation of trial counsel's ineffec- veness concerns counsel's failure to object to the intro- uction at trial of statements obtained from appellant by he police allegedly in violation of her rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). In her brief ap- ellant has failed to identify the objectionable statements. he merely makes a general reference to (1) statements she ade to the investigating officer, Trooper Vieczorek, as she as being driven to police headquarters in his vehicle (the tatements were made prior to being given *Miranda* warn-

gs), and (2) statements she made to Trooper Vieczorek at e police station, after having been advised of her *Miran-* rights. Our review of the record reveals that the only stimony Trooper Vieczorek gave at trial regarding appel-nt's statements to him concerned appellant's statement at, at one point, there was a tug of war between her hus-nd and the victim over the shotgun. N.T. December 14, 83, at 410. It is not absolutely clear from the record pre-sely when appellant made this statement. Given its lack specificity, we will not consider appellant's claim.[10] ssertions of ineffectiveness in a vacuum are not ineffec-veness, and claims of ineffectiveness raised in the abstract ll not be considered. *Commonwealth v. Silo,* 509 Pa. 6, 502 A.2d 173 (1985).

TRIAL COURT'S CHARGE TO THE JURY

Appellant next argues that the trial court erred in ree respects in its charge to the jury.

She first avers that the court erred when, in instruct-g the jury regarding appellant's claimed defense of justi-cation,[11] it stated that appellant's husband had a duty to retreat from deadly force. Conversely, appellant objects to e trial court's failure to include her requested point for harge that there is no duty to retreat from deadly force hen an individual is in his or her own dwelling.

[10] We note that if we were to consider appellant's claim on the erits, we would not find ineffectiveness since defense counsel had a asonable basis for not objecting to the introduction of the statement hich appellant made to Trooper Vieczorek. The statement was non-prej-dicial to appellant's case and, in fact, served to corroborate her testimo-y at trial concerning the shooting.

[11] It will be recalled that appellant testified that when she fired, her sband was lying on the floor in the dining room and that the victim as squeezing the trigger of a loaded shotgun which he had jammed gainst her husband's chest.

Appendix D

The relevant portion of the court's charge states:

Now, we're going to talk about the defense of justification. ... And what, in effect, it means is that if the conduct of the defendant though otherwise criminal in nature would, by virtue of certain circumstances under the law be legally justified, then no offense has been committed. When there is evidence presented at trial that deadly force was used in self-defense, the burden is upon the Commonwealth to prove beyond a reasonable doubt that the defendant was not acting in self-defense or defense of another. *In this particular case there is no allegation of self-defense but the defense of another person*. It is sufficient that the Commonwealth prove only that one of the elements required in the use of deadly force is lacking. If any element is disproved, then you may disregard the defense of justification.

A person is justified in using deadly force in defense of another person when and only when the circumstances are such that the latter person would be justified or excused if he or she had used deadly force in his own defense. Let me clarify that. The principles and the rules applicable to the use of deadly force for the defense of another person are the same rules that would apply to that person's own self-defense. A person interfering in a difficulty in behalf of another simply steps into the latter's shoes. He, or in this case she, may lawfully do in another's defense what such other might lawfully do in his own defense, but no more. She stands on the same plane. I use "she" here because we are talking about the defendant. She stands on the same plane, is entitled to the same

rights and is subject to the same conditions, limitations and responsibilities as the person defended, and her act must receive the same construction as the act that the person defended would receive if the deadly force was used by him.

It is necessary and sufficient to justify or excuse the use of deadly force in defense of another where neither the person defended nor the defendant shall be at fault in provoking or continuing the difficulty; secondly, that the danger, real or apparent to the person defended, should be of death or great bodily harm; third, that the danger should be present, imminent, impending, and not a past danger. Now, remember, you consider the facts as I mention these things, the facts as testified to, because you are going to have to decide whether or not the conduct on the part of the defendant was justified to protect her husband from an imminent, present danger. According to her testimony, she said that it was imminent; that the gun was in her husband's chest or pointed at his chest or above, and that she felt that there was the effort to pull the trigger. Fourth, that either the person defended shall be in real danger of death or great bodily harm, or it shall be reasonably apparent to her, in this case to the defendant, that she honestly and reasonably believed that the person defended is in such danger and that it is necessary to use deadly force to save him therefrom. *Fifth, that the person defended has the duty to retreat if he can do so without increasing his peril. And you consider, in a sense, this is a third person position. Was the [appellant] in a position to believe that there was the possibility that the person*

led, her husband, could retreat from the peril ut increasing the danger?

mber 15, 1983, at 446-448 (emphasis added).

lant correctly states that while, generally, there to retreat if such retreat can be safely accom- ne who is attacked in his dwelling need not re- may stand his ground and meet deadly force y force. *Commonwealth v. Eberle*, 474 Pa. 548, 90 (1977). She contends the trial court's state- appellant's husband had a duty to retreat was nd that the court should have included her re- harge regarding no duty to retreat. We agree. It llow, however, that the court's error warrants re- is axiomatic that, when an appellate court re- ry instruction, the charge must be read and con- a whole. *Commonwealth v. Rodriguez*, 343 Pa. 6, 495 A.2d 569 (1985). In addition, the error is ible unless the defendant was prejudiced there- *onwealth v. Morgan*, 265 Pa. Super. 225, 401 (1979). We find that, reading the instruction as appellant suffered no prejudice. With but one e., the duty to retreat, the court's charge correct- roughly outlined the salient features of the de- stification as it related to appellant's version of s surrounding the shooting.[12] In addition, the ructed the jury that, insofar as the duty to retreat rned, the Commonwealth would have to prove hat appellant's husband had a duty to retreat, but appellant's perception of the circumstances was

ote that the jury was free to completely reject appellant's e shooting and instead believe the testimony of the Common- nesses, which raised no issue of self-defense or defense or

ld have done so without increasing his peril. no possibility that the jury could have found the the latter element since the evidence present- justification[13] unequivocally established that husband could *not* have safely retreated. That h the trial court's error, the jury could not have the Commonwealth had established a violation to retreat. We accordingly conclude that the error in charging the jury that there is a duty even when one is attacked in one's own home) had no prejudicial impact on the jury's ns. The error was harmless beyond a reasonable

ant also contends that the court erred in failing the jury that (1) the porch of the house was part t's dwelling, and (2) that a landlord does not ht to remain on leased property against the ne lessee. We find that the opinion of the court l on April 4, 1985, adequately addresses and isposes of both these allegations, and see no rther comment in this regard.

fifth claim on appeal, appellant challenges the nality of the Firearms provision of the Manda- ncing Act, 42 Pa. C. S. §9712,[15] in the following

ant's testimony as to the justification defense was corrobo- testimony of her husband and brother.

on these same reasons, we find the court's error in failing to llant's requested point for charge regarding no duty to so harmless error in that the omission could not have affect- deliberations.

C. S. §9712 requires the imposition of a minimum sen- vears confinement for persons found to have been in visible a firearm during the commission of certain felonies.

contends that section 9712 violates the equal
ause; the due process clause, both in denying
d sentencing and in allowing proof of posses-
arm to be established by a preponderance of
e; the principle of separation of powers by
prosecutor complete discretion in deciding
voke section 9712; and the prohibition against
usual punishment.

im that section 9712 violates due process in
of of possession of a firearm to be established
derance of the evidence was explicitly rejected
eme Court in *Commonwealth v. Wright*, 508
A.2d 354 (1985), *cert. granted sub nom,*
Pennsylvania, 106 S.Ct. 58 (1985). In *Com-*
. Irving, 347 Pa. Super. 349, 500 A.2d 868
court held that section 9712 does not violate
tion, and in *Commonwealth v. Cofoni*, 349 Pa.
503 A.2d 431 (1986), we determined that it
olate separation of powers by granting unbri-
on to the prosecutor. Appellant's challenges to
2 on these grounds are accordingly without

d that appellant's claim that section 9712
process by impermissibly precluding individ-
encing is also without merit. In considering
in *Commonwealth v. Cooke*, 342 Pa. Super.
2d 63 (1985), this court stated that while the
poses sentence upon conviction, the fixing of
crimes is a task for the legislature, and, as one
s, the legislature may prescribe a mandatory
erm of imprisonment. *See Commonwealth v.*
339 Pa. Super. 32, 488 A.2d 293 (1985). "Due

y is not violated when courts accede to the
thority to frame a coherent statutory scheme
istration of sentencing ... ." *Commonwealth*
ra at 69, 492 A.2d at 69, quoting *Common-*
rnandez, supra at 40, 488 A.2d at 298.

t's final challenge to the constitutionality of
lleges that it violates the prohibition against
sual punishment in that, by not allowing for
of a defendant's individual circumstances, it
oportionate sentences. *See Solem v. Helm,*
(1983) (holding that the eighth amendment
imposition of significantly disproportionate
ppellant claims that the five year minimum
disproportionate in her case because she had
inal convictions.

section 9712 is violative of the prohibition
and unusual punishment is one of first im-
is Commonwealth. We conclude that it does

l above, while it is the judiciary's function to
nce upon conviction, it is for the legislature to
ies for crimes. *Commonwealth v. Cooke, su-*
eed by the Supreme Court in *Solem v. Helm,*
essing a claim that a sentence is so dispropor-
violate the eighth amendment, "[r]eviewing
uld grant substantial deference to the broad
t legislatures necessarily possess in determin-
s and limits of punishment for crimes ... ."
lm, Id. at 290. A punishment violates the
dment only if it is so greatly disproportionate
as to offend evolving standards of decency or
ense of justice. *Trop v. Dulles,* 356 U.S. 86

v. Zettlemoyer, 500 Pa. 16, 454
nied, 461 U.S. 970 (1983).

tment of section 9712 evinces a
ness of felonies committed with
rmination to protect the public
arms, to deter violent crime and
and to vindicate the legislature's
se who commit serious crimes
a firearm. *Commonwealth v.*
A.2d at 362. We find that section
y minimum sentence is not dis-
ousness of the crime appellant
shock either a balanced sense of
notions of decency. Appellant's
violates the prohibition against
nent is accordingly without mer-

n on appeal alleges that the trial
order the Commonwealth to dis-
ntents of certain notes which the
[5] The record reveals that during
nation on rebuttal of Trooper
ferred to several police reports
ession. Defense counsel asked to
District Attorney assented, but
on to first separate from the re-
otes which the victim had made
e testimony of defense witnesses.
ed that he should be allowed to
asis that they were "a written

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427, 353 A.2d
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(1979) (empha
were not pret
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witness, and, therefore, discoverable
T. December 14, 1983, at 417. After
s, the trial court denied defense
'e find that this action was correct.

ellant requested, by motion to compel
sure by the Commonwealth of state-
nd interviews of eyewitnesses. Pa. R.
provides for the disclosure of such

ry with the Court: In all court cases
lant files a motion for pretrial discov-
ay order the Commonwealth to allow
ttorney to inspect and copy or photo-
e following requested items, upon a
ey are material to the preparation of
d that the request is reasonable:

...

tten or recorded statements, and sub-
tim oral statements, of eyewitnesses
alth intends to call at trial.

making prior statements of Common-
ailable to defense counsel is to assist
g for subsequent cross-examination at
Commonwealth v. Grayson, 466 Pa.
976). That is, defense counsel may be
onsistencies between a witness's *pre-*
his trial testimony." *Commonwealth v.*
uper. 615, 624, 396 A.2d 1340, 1344
ded). The statements at issue herein
atements. Not only were they made
ere made after the victim has been
defense counsel, and thus could have

been of no possible assistance to defense counsel in preparing for that cross-examination. We accordingly find that the notes which the victim made during trial were not subject to discovery under Rule 305(B)(2).[17] We further note that our examination of Court Exhibit One reveals that, in any event, it contains very few statements. It consists primarily of questions posed by the victim regarding defense witnesses' testimony which, as the District Attorney informed the trial court, the victim wished covered during cross-examination of these witnesses. The few statements it does contain do not contradict the victim's testimony at trial.

Finding all of appellant's claims on appeal meritless, we affirm the judgment of sentence.

Judgment of sentence affirmed.

KELLY, J. concurs in the result.

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[17] Regardless of the applicability of Rule 305(B)(2), had the notes contained any material exculpatory of the defendant, disclosure would have been mandatory under the constitutional guarantees of *Brady v. Maryland*, 373 U.S. 83 (1983). Our examination of Court Exhibit One reveals it contains no such exculpatory material.

Appendix E

APPENDIX "E"

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

February 11, 1987

James P. McEvilly, Jr., Esquire
Suite One B
1200 Bustleton Pike
Feasterville, PA 19047

RE: Commonwealth v. Ehrsam, Petitioner
NO. 719 E.D. ALLOCATUR DOCKET 1986

Dear McEvilly:

This is to advise you that the following Order has been endorsed on your Petition for Allowance of Appeal, filed in the above captioned matter:

"February 2, 1987.

Petition Denied

Per Curiam."

Very truly yours,

/s/ Patrick Tassos
PATRICK TASSOS
Deputy Prothonotary

/mz
cc: Alan M. Rubenstein, Esquire

FEB 17 1987

Appendix F

EXHIBIT "F"

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

NO. 3400/1983

COMMONWEALTH OF PENNSYLVANIA

vs.

KATHLEEN MARIE EHRSAM,

Defendant/Petitioner

ORDER

AND NOW, this 29th day of July, 1988, after hearing on Defendant's Petition for Relief Pursuant to the Post-Conviction Hearing Act, it is hereby Ordered and Directed that the Petition is granted. It is further Ordered and Directed as follows:

(1) The Defendant is granted the right to file a Petition for Allowance of Appeal Nunc Pro Tunc from the Order of the Superior Court of Pennsylvania dated July 9, 1986, entered to No. 1408 Philadelphia 1988, affirming the judgment of sentence of this Court.

(2) Bail shall continue pursuant to Pa. R. Crim. P. 4011.

BY THE COURT,
/s/ Leonard B. Sokolove
Leonard B. Sokolove, J.

cc: Peter T. Campana, Esquire
Dale A. Reichley, Esquire
First Assistant District Attorney

N.B. It is your responsibility to notify all interested parties of the above action.

Appendix G

APPENDIX "G"

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

April 28, 1989

Peter T. Campana, Esquire
CAMPANA & CAMPANA
602 Pine Street
Williamsport, Pennsylvania 17701

RE: Commonwealth of Pennsylvania v. Kathleen Marie Ehrsham, Petitioner
No. 882 E.D. Allocatur Docket 1988

Dear Mr. Campana:

This is to advise you that the following Order has been endorsed on your Petition for Allowance of Appeal, filed in the above-captioned matter:

"April 27, 1989.

Petition Denied.

Per Curiam."

Very truly yours,
/s/ Patrick Tassos
PATRICK TASSOS
Deputy Prothonotary

/aw
cc: C. Theodore Fritsch, Esquire
Hon. Leonard B. Sokolove

Supreme Court, U.S.
FILED
SEP 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-2122

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

KATHLEEN MARIE EHRSAM,
Petitioner
v.
COMMONWEALTH OF PENNSYLVANIA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA

RESPONDENT'S BRIEF IN OPPOSITION

Ernest D. Preate, Jr.
Attorney General

Robert A. Graci
Chief Deputy Attorney General
Appeals and Legal Services Section

Andrea F. McKenna
Deputy Attorney General
Appeals and Legal Services Section

Mary Benefield Seiverling
Counsel of Record
Deputy Attorney General
Appeals and Legal Services Section

1600 Strawberry Square
Harrisburg, PA 17120
(717) 787-6348

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should consider the constitutionality of Pennsylvania's Mandatory Minimum Sentencing Act based upon a Due Process challenge to the prosecutor's alleged unbridled discretion where petitioner did not assert the theory now presented to the only state appellate court to rule on the merits of petitioner's claims and where recent Supreme Court authority controls the issue?

2. Whether Pennsylvania's Mandatory Minimum Sentencing Act for certain crimes committed with firearms violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by limiting discretion in sentencing?

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NO. 88-2122

UPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

KATHLEEN MARIE EHRSAM,
Petitioner
v.
MONWEALTH OF PENNSYLVANIA,
Respondent

ITION FOR WRIT OF CERTIORARI
SUPERIOR COURT OF PENNSYLVANIA

NDENT'S BRIEF IN OPPOSITION

ndent, Commonwealth of Penn- respectfully requests that t deny the petition for writ of i seeking review of the order ennsylvania Supreme Court deny- ioner's petition for Allowance . That order is set forth in dix to petitioner's brief at 35

OF JURISDICTION

tion of this Court is
U.S.C. § 1257(a) which
y writ of certiorari of
highest state court in
on could be had." Ap-
ht in noncapital crimi-
nnsylvania are heard by
Superior Court, an in-
llate court. See 42
Ann. § 742 (Purdon
er, further review is by
eal to the Pennsylvania
See 42 Pa.Cons.Stat.Ann.
81). A decision not to
of appeal is not a deci-
its of the case.[1] Res-
that this Court lacks

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99, 603, 442 A.2d 1104,
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ion to review the Pennsylvania
ourt's order in this case.[2]

the highest state court de-
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inued)Supreme Court "had
ecided the issue on its
cf. R.J. Reynolds Tobacco Co.
County, 479 U.S. 130, 138
ismissal of appeal by North
Supreme Court does constitute
on merits permitting review
57(a).

rder of February 2, 1987, the
ia Supreme Court denied
's first Petition for
of Appeal, thus declining to
its discretion to review the
opinion of the intermediate
court as entered on July 9,
itioner received permission to
cond Petition for Allowance of
rough relief granted pursuant
sylvania's Post Conviction
ct. 42 Pa.Cons.Stat.Ann. §§
seq. (Purdon 1982) By Order of
1989, the Pennsylvania Supreme
ied Petitioner's second Peti-
Allowance of Appeal, again de-
o exercise its discretion to
e Order and Opinion of the
ia Superior Court entered July

the judgment reviewable under 28 U.S.C. § 1257(a).[3] For this reason, the petition for certiorari should have been sought from the Pennsylvania Superior Court in the case of Commonwealth v. Ehrsam, 355 Pa.Super. 40, 512 A.2d 1199, 1203-1204 (1986). It was not. Thus, the petition should be denied for want of jurisdiction. See R.J. Reynolds Tobacco Co. v. Durham Company, 479 U.S. 130, 139 (1986) (Dismissing appeal from court which was not the "highest court" for want of jurisdiction.)

A second jurisdictional defect is present. This Court is without juris-

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[3]Sullivan v. Texas, 207 U.S. 416 (1908); American Ry. Exp. Co. v. Levee, 263 U.S. 19, 20-21 (1923); Hammerstein v. Superior Court, 341 U.S. 491, 492 (1951); Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 160 (1954); Interstate Circuit, Inc., v. Dallas, 390 U.S. 676, 678 n.1 (1968).

diction to grant "review" where the petitioner did not present her theory to the "highest court" in the state to rule on the merits.

Of the two claims of Fourteenth Amendment violations presented by petitioner for review, only the question of whether Pennsylvania's Mandatory Minimum Sentencing Act, 42 Pa.Cons.Stat.Ann. § 9712 (Purdon 1982), (hereinafter "Act") violates the Due Process Clause guarantees of the Fourteenth Amendment by impermissibly precluding individualized sentencing has been raised in and considered by the highest Pennsylvania court to review petitioner's case.

The issue of whether the prosecutor's alleged unbridled discretion in determining which defendants will be subject to the mandatory penalty works a constitutional violation was not raised in the Pennsylvania Superior Court as a

claim of unconstitutionality based upon due process. Rather, petitioner relied upon a violation of the principle of separation of powers. Consequently, the Pennsylvania Superior Court addressed the issue of the prosecutor's role in implementing the statute as it was raised--in terms of the principle of separation of powers. (See Pet. App. 28a-29a) The Pennsylvania Superior Court never addressed the issue in terms of a due process violation of the Fourteenth Amendment, as this issue was never presented to the court.

This Court will not decide a federal constitutional issue raised before it for the first time. Cardinale v. Louisiana, 394 U.S. 437 (1969). Nor will this Court address a constitutional issue presented on a new legal theory. Webb v. Webb, 451 U.S. 493, 496-98 (1981); Picard v. Connor, 404 U.S. 270,

278 (1971). Accordingly, this Court has no jurisdiction to consider whether the Due Process Clause of the Fourteenth Amendment is violated by the requirement that the mandatory minimum sentencing provisions of 42 Pa.Cons.Stat. Ann. § 9712 (Purdon 1982) are inapplicable absent the filing of a notice by the prosecution of its intention to proceed under the provision.

STATEMENT OF THE CASE

A. Factual History

Respondent relies upon the Pennsylvania Superior Court's statement of the facts in this case. Commonwealth v. Ehrsam, 355 Pa.Super. 40, 48-50, 512 A.2d 1199, 1203-1204 (1986), Pet. App. 13a-15a.

B. Procedural History In The Lower Courts

With one exception, respondent accepts the petitioner's procedural history.

Petitioner mischaracterizes her presentation of issues to the Superior Court of Pennsylvania and the court's action thereon. She states that the due process challenge was "presented on appeal and decided by the Superior Court". cert. pet. at p. 16. This statement is true, but incomplete and hence, misleading.

On direct appeal to the Superior Court of Pennsylvania, petitioner argued that the prosecutor's alleged unbridled discretion under the statute violated the principle of separation of powers. She chose not to raise any due process challenge to the prosecutor's role under the statute; thus, waiving the argument of due process violations. Kimmel v. Somerset County Commissioners, 460 Pa. 381, 333 A.2d 777 (1975) (failure to pursue an issue on appeal is as much a waiver as is the failure to initially raise the issue). Accord Commonwealth v. Hernandez, 339 Pa.Super. 32, 39 n. 4, 488 A.2d 293, 300 n.4 (1985). The court, obviously, did not address this issue since it was not presented.

C. Procedural History in the Supreme Court

The petition for writ of certioari was filed on August 15, 1989 and a copy was served on the Pennsylvania Attorney

General. The petition presents a constitutional challenge to a state statute. The Office of Attorney General initially deferred to the Bucks County District Attorney's Office for the filing of a response. By letter dated August 15, 1989, this Court directed that the Attorney General file a response to the petition.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Allegations That Pennsylvania's Mandatory Minimum Sentencing Act Violates The Due Process Clause Of The Fourteenth Amendment By Placing Unbridled Discretion In The Hands Of The Prosecution Were Never Presented By Petitioner To Or Ruled Upon By The Highest State Court To Address The Merits Of This Case. In Any Event, The Discretion Invested In The Prosecutor To File Notice Under The Act Is Not Different From The Discretion Invested In The Prosecutor At Every Stage Of A Criminal Prosecution, And Clearly Did Not Deny Petitioner Due Process.

This Court will not consider federal issues not presented and ruled upon below. Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). The rationale for this rule[4] is based on principles of feder-

[4] "In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U.S.C. § (footnote continued on next page)

alism as well as judicial economy. Absent consideration of the issue below, the Court is without the benefit of the lower court's reasoning. Here, since the highest court to rule on the merits was not presented with a due process challenge to the prosecutor's role under the Act[5] that issue is not properly

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[4](continued) 1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, O'Connor v. Ohio, 385 U.S. 92 (1966), they should be given the first opportunity to consider them." Cardinale v. Louisiana, 394 U.S. 437, 439 (1969).

[5]This issue was presented to the trial court. Initial appellate counsel (footnote continued on next page)

before the Court.

In any event, the Act is not invalid on this ground. Petitioner asks for review of a claim that the Pennsylvania Mandatory Minimum Sentencing Act, by placing on the prosecution the duty to serve a defendant with notice of its intention to seek a sentence under the Act, gives the prosecution unbridled discretion and thus denies petitioners due process. Contrary to petitioner's assertion that this question was left open by United States v. Batchelder, 442 U.S. 114 (1979), Batchelder controls.

In Batchelder, this Court held that

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[5](continued) waived the issue. No allegation of ineffective assistance of counsel was made by petitioner as to the appellate counsel who handled her appeal as of right. Rather, her post conviction relief petition alleged that counsel who prepared the petition for allowance of appeal to the Pennsylvania Supreme Court was ineffective.

due process permits the prosecutor to choose between bringing charges under two statutes with identical elements but different penalties. In the unanimous opinion, Mr. Justice Marshall noted that the prosecutor's discretion in choosing between the two statutes was not unfettered, but was in fact subject to constitutional constraints against invidious selectivity in enforcement. United States v. Batchelder, 442 U.S. at 124-25. Batchelder fully applies here, the prosecutor's responsibility to file notice to proceed under the Act is no different from the responsibility in Batchelder of choosing what crime to charge. Here the prosecutor's exercise of responsibility may remove discretion from the sentencing court as to the minimum term imposable. This does not distinguish this case from Batchelder, where the prosecutor's choice affected

the court's discretion as to the maximum term. See Martin v. Parratt, 549 F.2d 50 (8th Cir. 1977). Since this claim is directly controlled by authority that petitioner does not challenge, the petition for writ of certiorari should be denied.

II. Pennsylvania's Mandatory Minimum Sentencing Act For Certain Crimes Committed With Firearms Does Not Violate The Due Process Clause Of The Fourteenth Amendment By Limiting Discretion In Sentencing

Pennsylvania's Superior Court determined that Pennsylvania's Mandatory Minimum Sentencing Act, 42 Pa.Cons.Stat. Ann. § 9712, which requires the imposition of a five year minimum term of imprisonment upon conviction of certain offenses committed with the visible possession of a firearm, does not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution by impermissibly precluding individualized sentencing. This decision does not conflict with applicable decisions of this Court. The instant petition for a writ of certiorari should be denied.

It is well-established that due process considerations are applicable to the sentencing process. Gardner v. Florida, 430 U.S. 349 (1977). As this Court has explained, a determination that due process is applicable does not end the inquiry.

> Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation to authority that due process is flexible and calls for such procedural safeguards as the particular situation demands. . . .Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

Morrissey v. Brewer, 408 U.S. 471, 481 (1972). Further guidance as to the practical meaning of "due process" comes from Wolff v. McDonald, 418 U.S. 539

(1974), wherein this Court said: "The touchstone of due process is protection of the individual against arbitrary action of government." Id, at 558, The Act, designed to serve a compelling state interest, is a means reasonably related to its goals, and does not subject individual defendants to arbitrary government action. Accordingly, it is not violative of the due process provisions of the Fourteenth Amendment.

Pennsylvania's Supreme Court has determined that through the Act "[t]he Commonwealth seeks to protect the public from armed criminals and to deter violent crime and the illegal use of firearms generally, as well as to vindicate its interest in punishing those who commit serious crimes with guns." Commonwealth v. Wright, 508 Pa. 25, 41, 494 A.2d 354, 362 (1985) aff'd sub nom. McMillan v. Pennsylvania, 477 U.S. 79

(1986) (proof of visible possession of a firearm by a preponderance of the evidence not violative of due process). Thus any constitutional analysis of the statute challenged by petitioner must begin with a recognition that the statute serves a compelling societal interest.

Petitioner's argument that the Act impermissibly limits the discretion of the sentencing judge overlooks well-established state and federal case law. "Although the judiciary imposes sentences upon conviction, the fixing of penalties for crimes is a task for the legislature, and, as one of its options, the legislature may prescribe a mandatory minimum term of imprisonment." Commonwealth v. Cooke, 342 Pa.Super. 58, 69, 492 A.2d 63, 69 (1985) (mandatory five year minimum sentence under the Act does not violate due process by removing

discretion of sentencing judge to sentence defendant to lesser term); See also Commonwealth v. Hernandez, 339 Pa.Super. 32, 39, 488 A.2d 293, 297 (1985) (mandatory sentencing provisions of Pennsylvania's drunk driving law upheld against a variety of constitutional attacks). The Superior Court's decision properly followed this unbroken line of Pennsylvania authorities.[6] Commonwealth v. Ehrsam, 355 Pa.Super. 40, 60-61, 512 A.2d 1199, 1203-1204 (1986) Pet. App. 12a, 28a-29a.

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[6]Petitioner contends that under Commonwealth v. Martin, 466 Pa. 188, 132, 351 A.2d 650 (1976), individualized sentencing is required in all cases in Pennsylvania. This position is untenable. It ignores the fact that the Pennsylvania Supreme Court has already upheld this Act's constitutionality, Commonwealth v. Wright, supra) as well as the constitutionality of more onerous mandatory sentence provisions. (Commonwealth v. Sourbeer, 492 Pa. (footnote continued on next page)

The Pennsylvania Superior Court's approach squares fully with federal case law. The authority to define and fix the punishment for felony convictions is "purely a matter of legislative prerogative." Rummel v. Estelle, 445 U.S. 263, 274, (1980) (upholding mandatory life sentence against challenges under the Eighth and Fourteenth Amendments). Thus, although a disproportionate mandatory sentence may in extreme cases violate the Eighth Amendment, Solem v. Helm, 463 U.S. 277, 288-90, (1983); Rummel, 445 U.S. at 274 n. 11, due process is not violated merely because a statute divests the trial judge of discretion to sentence as he might

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[6](continued) 17, 422 A.2d 116 (1980) (mandatory life for first degree murder upheld); Commonwealth v. Cornish, 471 Pa. 256, 261, 370 A.2d 291, 293 (1977) (mandatory life for felony murder upheld).

wish.[7] See McMillan v. Pennsylvania, 477 U.S. 79, 92 (1986).

In non-death penalty cases, "the prevailing practice of individualizing sentencing determinations generally reflects simply enlighted policy rather than a constitutional imperative." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). "Sentencing in noncapital

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[7]That this Court should use the instant case as a vehicle to resolve the validity of federal sentencing guidelines is an absurd proposition. As conceded by petitioner (cert. pet. at 24), the issues here presented differ from those presented in the debate over federal guidelines. Though not mentioned by petitioner, one of the issues presented by the federal guidelines has already been resolved by this Court. Mistretta v. United States, ___ U.S. _____, 109 S.Ct. 647 (1989) (sentencing guidelines upheld against constitutional challenges based upon separation of powers principle and alleged excessive delegation of legislative power.

cases presents no comparable problems. We emphasize that in dealing with standards for imposition of the death sentence we intimate no view regarding the authority of a State or of the Congress to fix mandatory, minimum sentences for noncapital crimes." Lockett v. Ohio, 438 U.S. 586, 605, n. 13 (1977) (Op. of Burger, C.J.)

The Act permits sentencing discretion within the range set by the legislature with special consideration given to one fact, possession of a firearm. "Sentencing courts necessarily consider the circumstances of an offense in selecting the appropriate punishment, and we have consistently approved sentencing schemes that mandate consideration of facts related to the crime, e.g., Profitt v. Florida, 428 U.S. 242 (1976)." McMillan v. Pennsylvania, 477 U.S. 79, 92 (1986).

Pennsylvania's Mandatory Minimum Sentencing Act does nothing more than mandate that the sentencing court consider a particular fact and, upon a finding of that fact, impose a penalty within a circumscribed range. Further, the imposition of a mandatory five year minimum sentence for either aggravated assault or voluntary manslaughter offenses results in a sentence no greater than the longest minimum sentence which might be legally imposed, had visible possession of a firearm not been a sentencing factor.[8]

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[8]Of those offenses subject to the Act, all except aggravated assault, as specified in the Act, and voluntary manslaughter are classified as felonies of the first degree. Under Pennsylvania law a person convicted of a first degree felony may be sentenced to a maximum term of imprisonment of twenty years. 18 Pa.Cons.Stat.Ann. § 1106. As, in Pennsylvania, a minimum sentence "shall not exceed one-half of the maximum (footnote continued on next page)

As the Pennsylvania Supreme Court found:

> . . .[R]egardless of whether section 9712 is invoked a defendant convicted of one of the crimes listed therein could be sentenced to a minimum sentence of five (5) years.
>
> The effect of section 9712 is merely to limit the discretion of the sentencing court in the selection of a minimum sentence where it is determined that the defendant visibly posessed a firearm during the commission of a crime. The defendant has no cognizable right to leniency. Thus although a finding that

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[8](continued) sentence imposed," 42 Pa.Cons.Stat.Ann. § 9756(b), it is possible that the minimum sentence for a first degree felony could exceed five years, even without the application of the mandatory minimum sentence provisions. Aggravated assault, in the degree specified in the Sentencing Act, and voluntary manslaughter are each classified as felonies of the second degree for which the maximum sentence is ten years. 18 Pa.Cons.Stat.Ann. § 1106. The longest minimum sentence possible is five years, one-half the allowable maximum.

> this particular sentencing factor is present may have serious consequences for the defendant, we do not believe that a defendant subject to a section 9712 proceeding is in a position significantly distinguishable from that of other convicted defendants during the sentencing phase.

Commonwealth v. Wright, 508 Pa. 25, 32-33, 40, 494 A.2d 354, 362 (1985).

This Court has already adopted the Pennsylvania Supreme Court's assessment of the effect of Section 9712, writing in McMillan v. Pennsylvania:

> Section 9712 neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm. Section 9712 "ups the ante" for the defendant only by raising to five years the minimum sentence which may be imposed within the statutory plan. . . .

> . . . .The Pennsylvania Legislature. . . simply took one factor that has always been considered by sentencing courts to bear on punishment--the instrumentality used in committing a violent felony--and dictated the precise weight to be given that factor if the instrumentality is a firearm. . . .

McMillan v. Pennsylvania, 477 U.S. at 87-90 (emphasis supplied).

While this Court has recognized that due process is applicable to the sentencing process, Gardner v. Florida, 430 U.S. 349 (1977), this Court has also clearly articulated that "the defendant has no substantive right to a particular sentence within the range authorized by statute." Id. at 358.

This Court has already signaled, admittedly in dicta, the unlikelihood of its finding the Mandatory Minimum Sentencing Act violative of the Due Process

Clause on the grounds of impermissible limitations on the sentencing judge's discretion. Writing in McMillan v. Pennsylvania, supra, this Court said:

> Petitioners (in McMillan) apparently concede that Pennsylvania's scheme would pass constitutional muster if only it did not remove the sentencing court's discretion, i.e., if the legislature had simply directed the court to consider visible possession in passing sentence. . . . We have some difficulty fathoming why the due-process calculus would change simply because the legislature has seen fit to provide sentencing courts with additional guidance.

Id. at 92 (emphasis in the original)

The disposition of this petition, like McMillan v. Pennsylvania, supra, is controlled by Patterson v. New York, 432 U.S. 197 (1977). The premise of Patterson, as set forth by this Court in McMillan, supra, is this:

> "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government. Irvine v. California, 347 U.S. 128, 134 (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual states". . . .
>
> . . .Patterson teaches that we should hesitate to conclude due process bars the State from pursuing its chosen course in the area of defining crimes and prescribing penalties.

McMillan v. Pennsylvania, 477 U.S. 79, 85-86 (1986), quoting Speiser v. Randall, 357 U.S. 513, 523 (1958).

As Pennsylvania's Mandatory Minimum Sentencing Act comports with federal standards of due process, this Court should follow the teaching of Patterson and deny the instant petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania requests that this Honorable Court deny the petition for a writ of certiorari.

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In The

Supreme Court of the United States

October Term, 1989

KATHLEEN MARIE EHRSAM,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF IN OPPOSITION FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Whether the Commonwealth of Pennsylvania's Mandatory Minimum Sentencing Act, which provides a minimum, but not a maximum, penalty for certain offenses committed with a gun and requires notice to be given to the defendant before sentencing of the prosecutor's intention to invoke minimum mandatory sentence, violates the due process clause of the Fourteenth Amendment to the United States Constitution?

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No. 88-2122

In The

Supreme Court of the United States

October Term, 1989

KATHLEEN MARIE EHRSAM,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF IN OPPOSITION FOR RESPONDENT

The respondent, Alan M. Rubenstein, District Attorney for Bucks County, Pennsylvania, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Supreme Court of Pennsylvania's denial of petition for allowance of appeal dated April 27, 1983.

STATEMENT OF THE CASE

A. Factual History

On July 3, 1983, Andrew Woehrel was shot by petitioner, Kathleen Marie Ehrsam at a house petitioner rented from Mr. Woehrel. The property which was located in Kintnersville, Bucks County, Pennsylvania had been rented to petitioner and her husband, Edwin Ehrsam, and their family for approximately one year prior to the events leading to petitioner's conviction. The Ehrsam's had fallen behind in their rent payments and had been advised by Woehrel in May, 1983 that he wanted them to vacate the premises so new tenants could move in by July, 1983. The Ehrsam's informed Mr. Woehrel that they would vacate the premises by July 1, 1983. The Ehrsam's did not leave the premises by this date, so Mr. Woehrel offered to help them move out. Mr. Woehrel never received a response to his offer from the Ehrsam's.

On July 3, 1983, Mr. Woehrel drove to the Ehrsam's house to discuss the situation. An argument ensued between Woehrel, Edwin Ehrsam, and petitioner. The Ehrsam's advised Woehrel they would not leave voluntarily and Woehrel would have to evict them. Woehrel responded by offering to assist the Ehrsam's financially, and would permit them to camp on another property he owned. Edwin Ehrsam promised to get back to him with a response to that offer later that day.

Several hours later, Woehrel asked his son, Mark, and Mark's friend, Paul McBride, to stop by the petitioner's to see whether or not they had decided to leave. When he arrived, Mark discussed the situation with petitioner's husband. Petitioner then accosted Mark and Paul and threatened to shoot if they did not get off the porch.

In the meantime, Woehrel had asked a friend, Vic Jones, to accompany him to the Ehrsam's. Woehrel wanted Vic Jones to impersonate a prospective tenant for the property the Ehrsam's were currently living in. Although Jones refused to do this, he did agree to go with Woehrel to discuss the situation with the Ehrsam's again and to offer them the use of his van in moving.

Woehrel and Jones drove to the petitioner's in Woehrel's car and parked it in front of the house. Jones got out of the car, knocked on the door and yelled "hey, what are you doing?" He then ran to the car holding a shotgun which he threw into the back seat. Petitioner and her husband were on the porch of the house. A scuffle ensued in which petitioner and her husband attacked Jones in an attempt to regain the shotgun. Woehrel then observed a third person, later identified as petitioner's brother, Ted Praul, point a .22 rifle out of a window and shoot at the car tires. Praul then left the house and threatened to blow Woehrel's head off if the shotgun wasn't returned. Petitioner then took the shotgun into the house. At this time, Woehrel got out of the car to help Jones. As he approached the house, petitioner came out of the house onto the porch pointing the .22 rifle at Woehrel. Petitioner threatened to shoot Woehrel and then without further warning shot him, causing him to fall to the ground and scream "oh, I'm shot, Vic, I'm shot".

The result of the gunshot wound paralyzed Woehrel from the waist down and necessitated lengthy hospitalization and rehabilitation treatments.

B. Procedural History

Petitioner was charged with attempted homicide, aggravated assault, simple assault, recklessly endangering another person and possession of an instrument of crime. Following the preliminary hearing, at which the charges were held for court, the petitioner

was arraigned. Petitioner filed omnibus pretrial motions as well as supplemental omnibus pretrial motions. Additionally, petitioner had a pretrial hearing on those motions at which time the court dismissed said motions.

On December 12, 1983, the petitioner was tried by a jury before the Honorable Leonard B. Sokolove. The jury, on December 15, 1983, found petitioner guilty of aggravated assault, simple assault, recklessly endangering another person, and possession of an instrument of crime. Subsequently, trial defense counsel filed post verdict motions on December 27, 1983. The petitioner's motions for a new trial on arrest of judgment were denied in an opinion and order on April 4, 1985.

On May 17, 1985, petitioner was sentenced to five to ten years in a penal institution for the Commonwealth of Pennsylvania. On May 23, 1985 a motion for reconsideration of sentence was filed. This motion was denied on June 11, 1985.

Petitioner filed an appeal to the Superior Court of Pennsylvania on May 23, 1985. On July 9, 1986, the Superior Court of Pennsylvania affirmed the judgment of the trial court. *Commonwealth v. Ehrsam,* 355 Pa. Super. 40, 512 A.2d 1199 (1986).

On August 5, 1986, petitioner filed a petition for allowance of appeal to the Supreme Court of Pennsylvania. This petition was denied by the Supreme Court of Pennsylvania on February 2, 1987.

On February 24, 1987, petitioner filed to the Supreme Court of Pennsylvania for reconsideration of the denial of the petition for allowance of appeal. Petitioner's application for reconsideration was denied by the Supreme Court of Pennsylvania on April 27, 1987.

On August 7, 1987, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania. On May 3, 1988, Judge Muir denied petitioner's petition for writ of habeas corpus citing as his reasons that petitioner's petition contained claims which had not been previously exhausted through available state judicial remedies.

On July 13, 1988, petitioner filed a petition for relief pursuant to Pennsylvania's Post Conviction Hearing Act, in the Court of Common Pleas of Bucks County, Pennsylvania. In this petition, petitioner requested the right to file a petition for allowance of appeal to the Supreme Court of Pennsylvania *nunc pro tunc.*

On July 29, 1988 Judge Sokolove granted petitioner the right to file the petition for allowance of appeal *nunc pro tunc.*

On August 26, 1988 petitioner filed a petition for allowance of appeal to the Supreme Court of Pennsylvania. Petitioner raised the following issue: whether Pennsylvania's Mandatory Minimum Sentencing Act violated the due process clause of the Fourteenth Amendment to the United States Constitution.

On April 27, 1989, the Pennsylvania Supreme Court denied the petition for allowance of appeal. It is from that order that petitioner seeks a writ of certiorari.

This is the respondent's brief in opposition to the petition for writ of certiorari.

REASON FOR DENYING THE WRIT

I.

The Commonwealth of Pennsylvania's Mandatory Minimum Sentencing Act, which provides a minimum, but not a maximum, penalty for certain offenses committed with a gun and requires notice to be given to the defendant before sentencing of the prosecutor's intention to invoke minimum mandatory sentence, does not violate the due process clause of the Fourteenth Amendment to the United States Constitution.

Petitioner attacks the constitutionality of the Pennsylvania Mandatory Minimum Sentencing Act, 42 Pa. C.S. § 9712 as violative of the due process clause of the Fourteenth Amendment to the United States Constitution.

The Pennsylvania Mandatory Minimum Sentencing Act does not violate the due process clause of the Fourteenth Amendment to the United States Constitution. Due process of law is not offended when courts accede to the authority of the legislature to mold an appropriate statutory scheme for the administration of sentencing.

This Honorable Court has previously had the occasion to uphold the constitutionality of this statute as it pertains to due process. *McMillan v. Pennsylvania,* 477 U.S. 79, 106 S. Ct. 2411 (1986).

The Pennsylvania Supreme Court in the case of *Commonwealth v. Wright,* 494 A.2d 354 (Pa. 1985), addressed the constitutional challenge pertaining to due process of the Mandatory Minimum Sentencing Act, 42 Pa. C.S. § 9712 as follows:

> The effect of Section 9712 is merely to limit the discretion of the sentencing court in the selection of a minimum sentence where it is determined that a defendant visibly possessed a firearm during the commission of the crime. The maximum permissible term of imprisonment remains unaffected. The defendant has no cognizable right to leniency. Thus, although a finding that this particular sentencing factor is present may have serious consequences for the defendant, we do not believe that a defendant subject to a Section 9712 proceeding is in a position significantly distinguishable from that of other convicted defendants during the sentencing phase.

Therefore, this Honorable Court should not grant this petition for a writ of certiorari pursuant to Rule 17-1(c) as both the Pennsylvania state courts and this Court have decided the question of federal law currently at issue. No new issue of importance is presented by this petitioner.

Petitioner asserts that Pennsylvania's Minimum Mandatory Sentencing Act ignores the premise of individualized sentencing (Petitioner's Brief, 25). This simply is not true. Pennsylvania's Mandatory Minimum Sentencing Act does not unlawfully preclude individualized sentencing and therefore does not violate due process. *Commonwealth v. Cooke,* 342 Pa. Super. 58, 492 A.2d 63 (1985). Clearly, the judicial branch of our government fixes a sentence once an individual has been convicted; however, the fixing of penalties for crimes is a task for the legislative branch of government, and as one of its powers, the legislature can prescribe a mandatory minimum term of incarceration. *Cooke, supra.* Due process of law is not violated when courts accede to the legislature's authority to frame a coherent statutory scheme for the administration of sentencing for certain criminal offenses.

Commonwealth v. Hernandez, 339 Pa. Super. 32, 488 A.2d 293 (1985).

The two crucial indicators concerning the imposition of punishment in our society are jury determinations and legislative enactments. *Woodson v. North Carolina,* 428 U.S. 297 (1987).

Due process is not violated simply because the legislature has seen fit to provide sentencing courts with additional guidance in the form of mandatory sentencing. *McMillan v. Pennsylvania,* 477 U.S. 79, 106 S. Ct. 2411 (1986). This Court, in reviewing the statute currently before it, concluded that there is "no doubt that Pennsylvania's Mandatory Minimum Sentencing Act falls on the permissible side of the constitutional line." *McMillan, supra* at 2419.

Petitioner relies on *Commonwealth v. Pittman,* 528 A.2d 138 (Pa. 1987) for the assertion that the sentencing provisions of 42 Pa. C.S.A. § 9712 do not apply absent the filing of notice by the Commonwealth of its intention to proceed under this provision (Petitioner's Brief, 26). Respondent finds this argument curious for the following reasons: first, as conceded by petitioner, the District Attorney did provide petitioner with notice of the Commonwealth's intention to proceed with the mandatory sentence and secondly, the Pennsylvania Supreme Court in *Pittman* found the discretionary authority of the District Attorney to be constitutionally permissible. *Pittman, supra* at 142.

In *Commonwealth v. Parker White Metal Co.,* 512 Pa. 74, 515 A.2d 1358 (1986), the Supreme Court of Pennsylvania upheld two sections of the Solid Waste Management Act which proscribed identical conduct but provided for different penalties thus allowing the prosecutor to choose which section he wished to proceed under:

[T]his Court has consistently upheld, against due

> process challenges the authority of a prosecutor to choose between procedures and sentencing alternatives: In *Brunwasser v. Fields*, 487 Pa. 283, 409 A.2d 352 (1979) (upholding prosecutor's discretion as to whether to seek forfeiture or prosecution of candidate or public official under the Election Code); *Commonwealth v. Wade*, 402 A.2d 1360 (1979), (upholding prosecutor's discretion as to whether to prosecute defendant in a juvenile proceeding or as an adult offender).

Parker, supra at 142.

In *Commonwealth v. Lutz*, 508 Pa. 297, 495 A.2d 928 (1985), the Supreme Court of Pennsylvania upheld the prosecutor's discretion to decide whether or not to recommend a defendant who has been charged with drunken driving for the Accelerated Rehabilitative Disposition (ARD) program.

This Honorable Court in *United States v. Batchelder*, 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979) upheld a statutory scheme in which two federal statutes prohibited the same criminal activity, but provided for different terms of imprisonment. This Court rejected the lower court's view that allowing the prosecutor to choose which of the two statutes he wished to proceed under allowed a prosecutorial selection of penalties and, therefore, the possibility of unequal justice. *Pittman, supra* at 142.

A prosecutor may be influenced by the penalties available upon conviction, but this fact, standing alone, does not give rise to a violation of the equal protection or due process clause. *Batchelder, supra.*

Therefore, Pennsylvania's Mandatory Minimum Sentencing Act does not violate due process as it does not constitute an abuse

of discretion on behalf of the prosecutor.

As your Honorable Court is aware, recent years have produced statutes which provide an automatic and mandatory five year sentence for someone who uses or carries a weapon during the commission of certain federal felonies. *United States v. Belgard,* 694 F. Supp. 1488 (D. Or. 1988). In *Belgard*, the court held that Congress, consistent with the demands of due process, can mandate a specified sentence in a given case. *Belgard, supra* at 1494.

A defendant has no substantial right to a particular sentence within the range authorized by statute. *Gardner v. Florida,* 430 U.S. 349, 358, 97 S. Ct. 1197, 1204, 51 L. Ed. 2d 393 (1977). The sentence given to petitioner is authorized by Pennsylvania's statute governing crimes committed with a firearm. As stated in 1 Pa. C.S.A. §§ 1921 and 1922:

> (a) the object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions . . . Further, the legislature delineated its intentions when passing legislation.
>
> Section 1922. Presumptions in Ascertaining Legislative Intent
>
> (2). That the General Assembly intends the entire statute to be effective and certain.
>
> (3) That the General Assembly does not intend to violate the Constitution of the United States or this Commonwealth . . .

A statute will not be declared unconstitutional unless its violation of the Constitution is so clear, palpable and plain as to preclude doubt or hesitation as to its validity. *Snider v. Thornbush*, 496 Pa. 159, 436 A.2d 593 (1987); *Commonwealth v. Bryant*, 239 Pa. Super. 153, 361 A.2d 350 (1976).

Federal courts also give great deference to legislative acts: ruling on the constitutional challenge to an Act of Congress is the gravest duty which can confront a judge. *United States v. Belgard*, 694 F. Supp. 1488 (D. Or. 1988). The courts accord "great weight to the decisions of Congress". *Columbia Broadcasting Sys. Inc. v. Democratic Nat. Comm.*, 412 U.S. 94, 93 S. Ct. 2080, 2086, 36 L. Ed. 2d 772 (1973).

In *Rummel v. Estelle*, 445 U.S. 263, 100 S. Ct. 1133 (1980), this Court expressed a reluctance to review legislative mandated terms of imprisonment.

This Honorable Court has previously deferred to the legislature of the Commonwealth of Pennsylvania by finding the present issue before the Court to be constitutional. *McMillan v. Pennsylvania, supra.*

Therefore, this Honorable Court should deny and dismiss the petition for writ of certiorari challenging the constitutionality of Pennsylvania's Mandatory Minimum Sentencing Act.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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